AUG 17 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 552

STANDARD FORGE AND AXLE COMPANY, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERLE PHILLIPS, Counsel of Record
WILLIAM W. ALEXANDER, JR.
26 Pryor Street, N. E.
Atlanta, Georgia 30303
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	4
Statement of the Case	8
I. The Factual Background	8
A. Factual Background Concerning the Due Process Issue	8
B. Factual Background Concerning the Free Speech Issue	15
C. Factual Background Concerning the Surveillance Issue	19
II. The Decision and Order of the Board	23
III. The Decision of the Court of Appeals	26
Reasons for Granting the Writ	29
I. The Decision Herein is in Conflict with Decisions of Other Circuits and of this Court Concerning the Denial of Due Process Caused by the Restriction of Petitioner's Counsel's Right to Prepare for Trial	30
A. The Right to the Effective Assistance of Counsel is a Due Process Right Guaranteed to Petitioner by the Constitution, the Act, and the Board Regulations	30

TABLE OF CONTENTS (Continued)

Page

B. Interference by the Prosecuting Counsel with the Interviewing of Prospective Witnesses by Counsel for Petitioner is a Denial of Due Process Especially in a Board Proceeding Where Most Other Methods of Discovery are not Available 32

C. The Trial Examiner Should Have Conducted a Pre-trial Evidentiary Hearing on Petitioner's Motion 37

D. There was no Waiver by Petitioner's Failure to Renew its Motion 38

E. Petitioner was Prejudiced by the Denial of Pre-Trial Relief 39

II. The Decision Herein is in Conflict With Decisions of Other Circuits and in Conflict with Decisions of This Court with Respect to Petitioner's Exercise of its Constitutional and Statutory Right of Freedom of Speech 41

III. The Decision Below is in Conflict With Decisions of the First, Eighth and District of Columbia Circuits and with Decisions of the Board Itself in Regard to the Alleged Surveillance and Cannot be Justified Under the Substantial Evidence of the Record as a Whole 47

Conclusion 52

Certificate of Service 53

TABLE OF CONTENTS (Continued)

Page

Appendices:

A. Opinion of the United States Court of Appeals for the Fifth Circuit on Rehearing 9A

B. Opinion of the United States Court of Appeals for the Fifth Circuit on Rehearing 9A.

C. Opinion and Order of the Board and Trial Examiner 12A

D. Judgment of the United States Court of Appeals for the Fifth Circuit 79A

E. Amended Judgment of the United States Court of Appeals for the Fifth Circuit 81A

TABLE OF AUTHORITIES

Cases

Amalgamated Clothing Workers v. NLRB, 371 F.2d 740 (D.C. Cir. 1966) 49

American Communications Ass'n., C.I.O. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950) 47

Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965) 37

Atlanta Gas Light Co., 162 NLRB 436 (1966) 50

Bibb v. Commonwealth, 187 Va. 774, 48 S.E.2d 213 (1948) 33

Bokat v. Tidewater Equipment Co., 363 F.2d 667 (5th Cir. 1966) 12, 38

Bonham Cotton Mills, 121 NLRB 1235 (1958) 49

AUTHORITIES (Continued)

	Page
Brookhart v. Janis, 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966)	38
Bryant Chucking Grinder Co. v. NLRB, 389 F.2d 565 (2d Cir. 1967)	36
Chambers v. Maroney, U.S. , 26 L.Ed.2d 419, 90 S.Ct. (1970)	41
Colonial Corp. of America v. NLRB, F.2d , 74 LRRM 2115, 62 L.C. ¶ 10,360 (6th Cir. 1970)	43
Commonwealth v. Ballird, 349 Mass. 505, 209 N.E. 2d 308, 14 A.L.R. 3d 640 (1965)	33, 36, 40
Coppolino v. Helpern, 266 F.Supp. 930 (S.D. N.Y. 1967)	32, 34
Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965)	39
Goldberg v. Kelly, U.S., 25 L.Ed.2d 287, 90 S.Ct. (1970)	37
G.P.D., Inc. v. NLRB, 406 F.2d 26 (6th Cir. 1969)	45
Great Lakes Screw Corp. v. NLRB, 409 F.2d 375 (7th Cir. 1969)	31
Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966)	32, 33
Home Comfort Products Co., 180 NLRB No. 89, 73 LRRM 1082, 1969 CCH NLRB ¶ 27,556 (1970)	50
Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019, 146 A.L.R. 357 (1938)	38

AUTHORITIES (Continued)

Page

Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951) 31-38

Kastiel v. Superior Court, 162 Cal. App. 2d 710, 328 P.2d 476 (1958) 33

Leahy v. State, 111 Tex. Crim. 570, 13 S.W.2d 874 (1929) 33

Linn v. United Plant Guard Workers of America, 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966) 44

McCann v. Richardson, ... U.S. ..., 25 L.Ed.2d 763, 90 S.Ct. ... (1970) 31

Montgomery Ward & Co. v. N.L.R.B., 385 F.2d 790 (8th Cir. 1967) 48

Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938) 31

National Cash Register Company v. N.L.R.B., 415 F.2d 1027 (5th Cir. 1969) 42

N.L.R.B. v. Automotive Controls Corp., 406 F.2d 221 (10th Cir. 1969) 43

N.L.R.B. v. Clement Bros. Co., 407 F.2d 1027 (5th Cir. 1969) 32

N.L.R.B. v. Davidson Rubber Co., 305 F.2d 166 (1st Cir. 1962) 48

N.L.R.B. v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962) 42

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937) 31

AUTHORITIES (Continued)

Pa

N.L.R.B. v. Nabors, 196 F.2d 272 (5th Cir. 1952), cert. denied 344 U.S. 865.

N.L.R.B. v. Safway Steel Scaffolds of Georgia, 383 F.2d 273 (5th Cir. 1967), cert. denied 390 U.S. 955 (1968)

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 31, 32,

P. R. Mallory & Co. v. N.L.R.B., 389 F.2d 704 (7th Cir. 1967)

Reynolds v. Cochran, 365 U.S. 525, 5 L.Ed.2d 754, 81 S.Ct. 723 (1961)

Shenk v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919)

Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938)

Sinclair Co. v. N.L.R.B., 395 U.S. 575, 23 L.Ed.2d 547, 89 S.Ct. 1918 (1969) 42

Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969)

Southwire Co. v. N.L.R.B., 383 F.2d 235 (5th Cir. 1967)

St. Armant v. Thompson, 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968)

State v. Papa, 32 R.I. 453, 80 At. 12 (1911)

State v. Wilson, 93 Ga. App. 229, 91 S.E.2d 201 (1956)

AUTHORITIES (Continued)

Page

Ulm v. Moore-McCormack Lines, 115 F.2d 492 (2d Cir. 1940), cert. denied 313 U.S. 567 (1941) 39

Union Carbide Corp. v. N.L.R.B., 310 F.2d 844 (6th Cir. 1962) 43, 45

United Auto Workers v. N.L.R.B., ____ F.2d ____, 74 LRRM 2481, 63 LC ¶ 10,943 (6th Cir. 1970) 51

United States v. Powell, 156 F.Supp. 526 (N.D. Cal. 1957) 33, 36

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) 51

Universal Packaging Corp., 149 NLRB 262 (1964) 49

Watts v. United States, 394 U.S. 705; 22 L.Ed.2d 664, 89 S.Ct. 1399 (1969) 44

White v. State, 52 Miss. 216 (1876) 33

Statutes

National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 *et seq.*)

Section 8(a)(1) 29, 41

Section 8(c) 4, 5, 26, 30, 42, 43

Section 10(b) 2, 3, 5, 39

Section 10(e) 2, 5, 26

28 U.S.C. § 1254(1) 2

AUTHORITIES (Continued)

Page

Constitution

Constitution of the United States:
First Amendment 3, 4, 30, 42, 4
Fifth Amendment 2,

Regulations

Rules and Regulations, National Labor Relations Board, Series 8, as amended (29 C.F.R. § 102.1, *et seq.*)
Section 102.24 6
Section 102.28 ..... 6, 39
Section 102.38 ..... 2, 6
Section 102.41 ..... 7, 39
Section 102.43 7

Court Rules

Federal Rules of Civil Procedure
Rules 26-37 32
Rule 46 ..... 7, 39

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Standard Forge and Axle Company, Inc., petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on October 22, 1969, and the decision on timely petition for rehearing of said Court, entered on May 21, 1970, granting enforcement, as modified on petition for rehearing, of an order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW

The original opinion of the Court of Appeals (App. A., *infra*, pp. 1A-8A)[1] is reported at 420 F.2d 508. The opinion on petition for rehearing of the Court of Ap-

[1] All references to "App." are references to the Appendix hereto designated by the reference.

peals (App. B, *infra*, pp. 9A-11A) is unofficially reported at 74 LRRM 2260, 62 LC ¶ 10,502. The decision and order of the National Labor Relations Board (App. C, *infra*, pp. 12A-78A) are reported at 170 NLRB No. 82, 68 LRRM 1362, 1968-1 CCH NLRB ¶ 22,295.

JURISDICTION

The decision of the Court of Appeals was rendered on October 22, 1969 (App. A, *infra*, pp. 1A-8A); its original judgment (App. D, *infra*, p. 79A-80A) was entered on November 13, 1969; its opinion on timely petition for rehearing granting partial relief and denying the petition for rehearing in all other respects (App. B, *infra*, pp. 9A-11A) was entered on May 21, 1970; and its amended judgment (App. E, *infra*, pp. 81A-86A) was entered August 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTIONS PRESENTED

(1) Whether petitioner was, in violation of due process requirements, denied its right to the effective assistance of counsel contrary to the Fifth Amendment to the Constitution, Section 10(b) of the Act, and Section 102.38 of the Board Regulations because of an erroneous statement by the prosecuting attorney to prospective witnesses that pre-trial interviewing of them by Petitioner's counsel was illegal.

(2). Whether the Trial Examiner, whose denial of relief was upheld by the Board and the Court, erred on failing to hold a pre-trial evidentiary hearing to determine the extent of harm to petitioner from the alleged interference with petitioner's lawful exercise of its right to prepare for trial by interviewing prospective witnesses, after sufficient request by petitioner for such a hearing in order that appropriate, pre-trial, curative relief could be granted.

(3). Whether a substantially accurate statement, based on objective factual knowledge, of the possible adverse economic effects of unionization which would be caused by factors beyond petitioner's control, and which was made sufficiently prior to the election that it could be investigated and rebutted by the union seeking to represent the employees, can amount to unlawful interference, threat and coercion and thereby lose its protection under the First Amendment to the Constitution and under Section 7 of the Act.

(4). Whether a finding of unlawful surveillance of a union meeting may be predicated upon the showing that a supervisor, accompanying an employee on an errand of the employee at the employee's request, arrives legitimately at a particular spot on a public street where the employee's errand is to be consummated, allegedly becomes aware that a union meeting is being conducted next door, and then remains there with the employee until the employee's errand is consummated, from which showing the Board, by a process of unreasonable, complementary inferences concerning the knowledge, state of mind, and motives of the supervisor, draws the ultimate inference that the supervisor

unlawfully lingered at the spot, and can such a finding properly be sustained as one based on substantial evidence?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the Constitution provides in pertinent part:

> "Congress shall make no laws ... abridging the freedom of speech ...".

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 *et seq.*), insofar as is here pertinent, provides:

Section 8(c):

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 10(b):

"... (T)he Board ... shall have power to issue and cause to be served upon such person a complaint stating the charges ... and containing a notice of hearing ... at a place therein fixed, not less than five days after the serving of said complaint. ... The person so complained of shall have the right to file an answer ... and to appear in person or otherwise and give testimony at the time and place fixed in the complaint.... Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States ..."

Section 10(e):

"... The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive.... Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review ... by the Supreme Court of the United States upon writ of certiorari ... as provided in section 1254 of Title 28."

The Rules and Regulations, Series 8, as amended, of the National Labor Relations Board (29 C.F.R. § 102.1 *et seq.*), insofar as here pertinent, provide:

Section 102.24:

"All motions made prior to the hearing shall be filed in writing with the Regional Director issuing the complaint, and shall briefly state the order or relief applied for and the grounds for such motion. The moving party shall file an original and four copies of all such motions and immediately serve a copy thereof on the other parties. All motions made at the hearing shall be made in writing to the Trial Examiner or stated orally on the record."

Section 102.28:

"The right to make motions or to make objections to rulings upon motions shall not be deemed waived by the filing of an answer or by other participation in the proceedings before the Trial Examiner or the Board."

Section 102.38:

"Any party shall have the right to appear at any such hearing in person by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the Trial Examiner."

Section 102.41:

"Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objections, and included in the record. No such objections shall be deemed waived by further participation in the hearing."

Section 102.43:

"In the discretion of the Trial Examiner, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearing by the Trial Examiner, or by other appropriate notice."

Rule 46 of the Federal Rules of Civil Procedure, insofar as is here pertinent, provides:

"Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor ..."

STATEMENT OF THE CASE.

I. The Factual Background

Factual Background Concerning the Due Process Issue

On Monday through Wednesday, July 10-12, 1967, of the week prior to the beginning of the hearing, due to commence on Tuesday, July 18, 1967, petitioner's counsel interviewed five to ten employees of the Company in preparation for trial[2] (A 71-81, 83).[3] Although further interviews of other employees were planned (A 81), they were not held as the result of the actions of an attorney on the staff of the General Counsel of the Board.

On Friday, July 14, 1967, petitioner's counsel received a report that counsel for the General Counsel, Mr. McGrath, had advised an employee that the interviews conducted by petitioner's counsel were illegal and the employees who were questioned could file unfair labor practice charges against the petitioner and its counsel. It was then believed that this information was conveyed to other employees of petitioner (A 76-78).[4]

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[2]This questioning was preceded in each instance by appropriate warnings and explanations to the employee of his rights and it is established that such questioning was lawfully conducted (A 74-75, 79, 82).

[3]"A" references are to the printed Appendix filed in the Court below. "Add" references are to the Addendum to the Brief filed by Petitioner in the Court below. "SA" references are to the printed Supplemental Appendix filed in the Court below.

[4]This attorney, a Mr. J. Thomas McGrath, who allegedly so advised employes, was the same one who appeared as counsel for the General Counsel at trial and who prosecuted the case against petitioner.

On that day, petitioner's counsel promptly filed a telegraphic motion with the Chief Trial Examiner of the Board setting forth the above information, alleging that this conduct interfered with the "right to prepare its case for trial, now scheduled for July 18, 1967, and requesting that "the trial be continued until such date that Counsel for the General Counsel remedies his improper action." *Copies of this telegraphic motion were served upon the Regional Director*, Mr. McGrath and counsel for the union[5] which was the charging party in the case (SA 8-9). On that same day this motion was denied on the ground that it should have been made to the Regional Director issuing the Complaint." The telegraphic denial (SA 10) concluded with the following highly pertinent advice:

> ". . . The Respondent (petitioner here) may, however, make motions to the Trial Examiner upon commencement of the hearing with respect to the subject matter of the instant motion for such action by his (sic) as he may deem appropriate."

On Saturday, July 15, 1967, petitioner's counsel interviewed one of the employees believed to have received such instructions from Mr. McGrath. This employee declined to answer when he was asked if he had been advised to file unfair labor practice charges. He also declined to answer further questions and the interview was terminated (A 76).

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[5]United Steelworkers of America, AFL-CIO.

At the very outset of the hearing, petitioner's counsel stated he "would like to make a motion for continuance and *in support of that motion state facts and, if indicated, present evidence*" (A 74; emphasis supplied). He then stated "in my place as Counsel, *and if evidence is indicated, later on we would show*" (A 74-75; emphasis supplied) that he properly conducted prehearing interviews of employees in preparation for the hearing (A 74-76), that on the previous Friday he received the report that Mr. McGrath had advised one of the employees interviewed that this conduct was illegal and the "employee could file unfair labor practice charges for the questioning" (A 76). He further stated that he believed he could "show" that the employee had communicated this advice to other employees involved (A 78).

The Trial Examiner was informed that the telegraphic motion, *supra*, had been made and he stated he was aware it had been denied as "improperly made" to the wrong official (A 84-85). He also stated that he believed petitioner's counsel should have made a similar motion to the Regional Director on Monday, July 17 (A 85-86). Petitioner's counsel responded that the information had been received late on Friday; that "we felt this was a matter that goes to the procedure at the hearing" (A 84); that "we are dealing with a matter of due process of law, with the short notice before trial"; that he believed he could properly have deferred seeking any relief until the hearing "in view of the short period of time to which we received notice" (A 85). He informed the Trial Examiner that he had received the telegraphic denial on Saturday (A 85)

and that he had spent "Saturday in Montgomery attempting to investigate and verify" after "we were given leave to refile this motion in the order from the Chief Trial Examiner" (A 86).

Petitioner's counsel had already informed the Trial Examiner that the employee involved declined to answer any questions concerning the alleged advice from Mr. McGrath and that the interview was then terminated in accordance with counsel's understanding of Board law (A 76). He had also previously pointed out to the Trial Examiner, in support of the motion, that he was "in no position to commence a wholesale investigation at this point of what General Counsel has done in connection with his preparation of the trial because I think that the Board has held that that sort of thing is an unfair labor practice." Also he had stated he was "most reluctant, most reluctant, your Honor, to expose myself to the problem of making further investigations in this area" (A 78). He several times pointed out to the Trial Examiner that such alleged advice from the attorney prosecuting the case encouraged employees, both objectively and subjectively, from cooperating in lawful trial preparation (A 77, 78).

Petitioner's counsel also introduced to support his allegations of prejudice, an affidavit by a psychologist expert in the field of communications which result in changes in behavior and attitudes which set forth the prejudicial psychological effects which inhere in allowing public sworn testimony without rigorous pre-testi-

monial scrutiny by an adverse party.[6] He then directed the Trial Examiner's attention specifically to a decision of the Fifth Circuit stating that "wide latitude should be accorded in receiving evidential factual support for the employer's contention" concerning "the issue of denial of due process resulting from the inhibitory effect on prehearing investigation" where the employer's counsel has been independently charged with commission of an unfair labor practice because of his interviews of employees in preparation for trial.[7] A copy of the affidavit and of the case were furnished to the Trial Examiner, followed by counsel's final assertion that, in accord with the decisions of "some seventeen Appellant (sic) Courts . . . *if we have, in effect, had questioning before trial interfered with, it is a due process violation*" (A 81; emphasis supplied).

The Trial Examiner then elicited from Mr. McGrath the statements that Mr. McGrath opposed the motion, that he had in fact spoken to "some" of the employees subsequent to the interviews by Mr. Bacheller (A 81-

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[6]This affidavit, accepted as Respondent's Exhibit 2 at the hearing, is reproduced in full at SA 1-8. The expert qualifications of the psychologist, Dr. Arthur M. Cohen, also part of this exhibit, are reproduced in full at A 438-444. Petitioner furnished to the Court on appeal further relevant articles by leading psychologists on this question, supporting its claim of inherent prejudice (Add., pp. 63-68).

[7]*Bokat v. Tidewater Equipment Co.*, 363 F.2d 667, at 673, fn. 12, (5th Cir. 1966). The counsel who represented petitioner in the unfair labor practice hearing and interviewed the employees, Mr. John Bacheller, Jr., was the same attorney charged with the allegedly unlawful interviews in the *Tidewater* case and his carefully circumscribed investigation in the instant case, his reluctance to conduct a wholesale personal investigation on his own, and his desire that the Trial Examiner rather have a hearing on the matter, can be well appreciated.

82); that he had contacted his office for advice "when I first heard they were interviewing witnesses to find out the proper scope of this thing"; and the assertion by Mr. McGrath "that the whole allegation is false" (A 83). Following a further colloquy on whether petitioner's counsel should have made his motion to the Regional Director prior to the hearing (A 83-86), previously discussed *supra*, and the length of time it was expected to take to try the case (A 86-88), the Trial Examiner recessed the hearing to consider the motion (A 88).

Upon resumption of the hearing, the Trial Examiner denied the motion even though he recognized (A 88-89) that:

> "As the matter now stands, I have merely before me X party (sic; should be ex parte) statements on the part of Counsel for the Respondent and the General Counsel, (n)either determining whether these allegations are properly supported."

In denying the motion the Trial Examiner stated that Petitioner's counsel would be able on cross-examination to question witnesses produced by the General Counsel as to any statements that may have been made by the General Counsel concerning the conduct of the company counsel (A 88).[8]

After the denial of the motion, counsel subsequently

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[8]The Trial Examiner later *denied* petitioner's counsel the right to cross-examine on this matter even though he had twice stated this was the proper way to proceed (A 122-124).

interrupted the Trial Examiner twice to renew and emphasize the importance of the motion and the necessity that pre-hearing relief be granted in order to avoid the detrimental psychological impact upon employee-witnesses outlined in Dr. Cohen's affidavit. Petitioner's counsel first expressly and clearly outlined his motion and the relief sought in the following colloquy (A 89-90; emphasis supplied):

> "MR. BACHELLER:
> I will try to be brief. I understand that you have ruled. For the record, *the remedy which we seek* in response to this motion *is a continuance until such time as* either *the Trial Examiner* or Regional Director *can conduct an investigation into the facts* of the information which we have brought to the attention of the Trial Examiner.
>
> "TRIAL EXAMINER:
> That is why *an investigation could more adequately be conducted in the present proceeding by way of Cross Examining the witnesses.*[9]
>
> "MR. BACHELLER:
> Secondly, the remedy we seek is, should there be a basis found to the truthfulness of the information we have brought to the Trial Examiner's attention this morning, the remedy would be that the employees of Standard Forge and Axle would be advised by the Regional Director and Counsel for the General Counsel af-

[9] See footnote 8, *supra*.

> firmatively that we have the right to conduct proper questioning prior to the trial. It is our position that once these employees have testified in accordance to Dr. Cohen's affidavit, that the denial of due process existed and the only remedy that would be appropriate then would be the dismissal of the complaint as the result of the denial of due process."[10]

Petitioner's counsel then again referred to "the importance of resolving this evidence before the witnesses testify" (A 91) and requested that "if the Trial Examiner will not accept evidence at this point I would like for him to accept my statement as an offer of proof at this point in the event that it subsequently becomes error for you not to have heard evidence at this point." This request was granted (A 91-92).

Factual Background Concerning the Free Speech Issue

An election was held on February 23, 1967, to determine whether the employees of petitioner desired representation by the union (App. C, p. 16A). This followed the union's request for recognition on November 23, 1966, the filing of a representation petition by the union on December 5, 1966, requesting such an election, and the direction, on January 24, 1967, of such an election by the Regional Director (App. C, p. 20A).

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[10] At this point the Trial Examiner also denied a motion for a one-day adjournment to allow petitioner's counsel to appeal to the Board the Trial Examiner's denial of the due process motion. This denial was predicated apparently on the Trial Examiner's opinion that it would not be "at all impossible" for petitioner's counsel to try the case and concurrently take an interim appeal to the Board (A 90-91).

Prior to the election, petitioner distributed five letters, each dated, respectively December 8, 1966, and January 12 and February 2, 9, and 20, 1967 (A 418-425).[11] Petitioner also, prior to the election, distributed to its employees a circular (A 426-427) and a booklet (A 428).

The letter of February 9, 1967, in its entirety, read as follows (A 422-423):

> "Having been your Sa[illegible] Manager for about 20 years, since I take the [illegible]me pride in the growth of Standard Forge that you do, I feel that I would not be doing my duty to you and the Company unless I give you my comments on a matter that gives me great concern.
>
> "As your Sales Manager, it is my responsibility to secure business from our customers in order to keep all of us busy. There have been times in the past 20 years during which this has been difficult to do, but we have continued to grow. We cannot do this without your continued help; and holding all the business given us by our present customers and adding new ones as we can.
>
> "Customers buy products on the basis of prices, delivery and dependability. The facts are that in some cases we are the sole source of supply for many of our customers. Our sales

[11] The propriety of all the letters except that of the February 9 one was not an issue at the hearing (App. C, p. 93).

to customers who are buying all of their axles from us amounts to more than 70% of our total volume of sales. We have been told by many of these customers that we would not continue to be the sole source of supply if we became unionized, because of the ever present possibility of a work stoppage due to strikes or walkouts.

"I am a firm believer in a person being given the right to make up his own mind about his future, but I feel that you should have the above facts which you might not have thought about. Unless we continue to maintain the same fine relationship between office and plant I feel we will go backward instead of forward.

"It has been a great pleasure on my part to have spent better than 20 years with you, and so far as I am concerned my relationship with you has left nothing to be desired. I hope that I will continue to be able to assure our customers that they can always depend on us to supply all their needs on the products which we manufacture. If I can do this I have no worries about the future of all of us at Standard Forge and Axle Company.

Sincerely,

J. A. Rumbley
SALES MANAGER"

At the hearing, Mr. Rumbley testified that prior to the time he wrote the letter he determined that "ap-

proximately seventy per cent of our volume goes to those class of customers," having referred to customers who were "purchasers of axles from only Standard Forge and Axle Company" (A 303). He explained that what he meant by such customers were those "who normally plan on our being their whole source of supply" and that it was "right" that "generally, these people buy one hundred per cent of their axles from (petitioner)", although some "have their own specifications which they insist on" and "from time to time, rather than lose an order, purchase competitive axles as well as use ours" (A 304). This was explained later as a situation where a motor freight line specified a particular brand of axle and petitioner's customer would, therefore, buy that brand to please its own customer if it could not get the customer to change its specifications in favor of petitioner's axles (A 307).

He named three specific customers who informed him that petitioner "would not continue to be the sole source of supply for axles" if petitioner were organized — Dorsey Trailer Company, Great Dane Trailer Company, and Trailco Manufacturing and Sales Company. He gave their locations and the name of the company official who told him that petitioner would cease to be their sole source (A 304-305). He further testified that Dorsey Trailer Company did in fact purchase some axles from a competitor prior to the election (A 305). He stated that the purchases of these three customers amounted to "eighteen to twenty per cent" of the petitioner's business (A 306). Further, he testified that this relationship between unionization of petitioner and petitioner's position as sole source supplier of many

of its customers, including specifically the three named customers, "has been a topic of discussion over a period of many years" (A 304) and that other customers, besides the named three, had told him over the years that if petitioner became unionized, it would not continue to be their sole source of supply (A 306). The specific statements of the three named customers, in the context of the organizational drive, were made in telephone conversations initiated by Rumbley in two instances (Dorsey and Great Dane) and in a telephone conversation initiated by a Trailco representative who had heard of the activity and called to check up on it, requesting that he be kept posted concerning developments and the results of the election (A 304-306). In informing these customers of the union organizational campaign, Mr. Rumbley was following his past practice of notifying them "of things that might interfere with the relationship between (petitioner) and them in advance" because he had "been told by so many of them that it was my personal responsibility" so to inform them (A 309).

Factual Background Concerning the Surveillance Issue

The Board presented four witnesses on this issue, petitioner's employees Missildine, Cannon, and Marston[12] and a staff representative of the union, Williams.

The union meeting in question was held on Sunday, December 18, 1966, in the tiny town of Prattville, Ala-

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[12]Marston is erroneously referred to in the Appendix below as "Morriston" due to errors in the original trial transcript, and this error was corrected by the Trial Examiner (App. C, p. 17A, fn. 1).

bama. Prattville has a business district only two blocks long and the union hall was located next door to the building housing *The Prattville Progress*, the local newspaper (App. C, pp. 30A-31A).

Missildine testified that he saw Frazier Paul, a foreman in petitioner's machine shop,[13] together with employees Kilpatrick and Jenkins, in a parked car in front of the offices of *The Prattville Progress*, about twenty feet from the door of the union hall and on the same side of the street: He did not see Paul looking at him or the union hall, but "just saw him sitting in his car," and by looking out the union hall window he saw the car remained parked there for at least thirty minutes (A 139-142). Missildine, who was "active" in organizing the union drive (A 162-163), did not know whether Jenkins had any position on a "committee for employees who do not want a union" which circulated some letters to employees during the preelection campaign (A 143).

Cannon, who was chairman of the union organizing committee (A 154) testified he saw Paul, Jenkins, and an employee named Henderson sitting in the car. He did not speak to them. He observed the car for at least thirty minutes from his position at the front of a table where he could look out a window of the union hall (A 157).

Marston, who was one of the "four committee chairmen" for various branches in the plant during the union's campaign (A 163), saw Paul and Jenkins in

[13]Petitioner, in its answer to the complaint in this case, admitted Paul was a "supervisor within the meaning of the Act" (A 395).

the car down the street from the hall (A 214-215). He testified that "right in front of the hall all the parking spaces were taken." He did not speak to them, but he did wave to them, they waved back to him, and then he "motioned for them to come on up and I went on upstairs in the union hall" (A 215). Marston testified he only learned of Jenkins' role in the anti-union drive some month and a half after this (A217).

Williams, the union staff representative, testified that this meeting was the only one held on a Sunday and that normally the meetings were held weekly on Thursday, starting, November 11, 1966, at the union hall in Prattville (A 150). The car in question could be seen from "the top (of the hall) where we were meeting" and "we went down to investigate this vehicle" (A 149). He did not testify to any conversation with the occupants.

Two witnesses for the Company, an employee, Jenkins, and the supervisor, Paul, testified concerning the alleged surveillance. Jenkins testified he rented a house in Prattville to one Bond who gave Jenkins a check on October 31 for the November, 1966, rent. At Bond's request, Jenkins held the check until the fifteenth and then put it through the bank. The bank refused to honor the check and returned it to Jenkins. Jenkins then borrowed the necessary money to cover the check from his supervisor, Paul, and reclaimed the check from the bank (A 283).

On December 18, 1966, Jenkins called Paul with the suggestion that they go to Prattville to collect their money. Paul agreed and at Paul's insistence, they rode

in Paul's car to Prattville. When they arrived at Bond's house, Bond's wife told the men that he was at work at *The Prattville Progress*, and she told them where its building was. Jenkins did not know where it was before this. They "found the Prattville Progress and parked almost in front of it." No one answered the first time Jenkins shook the door, but there was noise inside. After about a half hour wait, the men caught the attention of someone inside the office and talked to Bond. After talking to Bond another employee, Kilpatrick, came up and the three had coffee (A 283-285).

Jenkins knew that there was to be a union meeting that day. He did not know that the union hall was in the same block as *The Prattville Progress*. He did not tell Paul that there was to be a meeting that day; in fact, they did not discuss the union (A 287-288).

Paul freely admits that he was in Prattville on December 18, and he corroborates Jenkins' story. Paul testified that he did not know where the union hall was or that there was a union meeting going on (A 278, 279). Paul freely admitted seeing and speaking to employees Kilpatrick and Peterson that day (A 279, 280-281); but stated he did not see Marston or Cannon (A 280). He testified Peterson got in the car and chatted with him and Jenkins a few minutes and that Kilpatrick went with Jenkins and him to have a cup of coffee after Jenkins had talked to Bond (A 280-281). He testified after Jenkins unsuccessfully tried to open the door of the building and returned to the car, he made no suggestion that Jenkins make any particular other efforts to attract the attention of anyone inside.

II. The Decision And Order Of The Board

The Trial Examiner in his decision predicated his denial of petitioner's motion for an evidentiary hearing concerning the interference with counsel's pre-trial preparatory investigation on the grounds that (1) it should have been made to the Regional Director prior to the hearing, and (2) that to grant the motion would inhibit investigation of illegal conduct by attorneys. He also noted petitioner's counsel failed to renew their motion at the close of General Counsel's case, although he had given leave for such renewal (App. C, pp. 17A-18A, fn. 2). The Board predicated its finding that this denial was proper solely upon the ground that the motion was not so renewed in spite of the leave granted to do so (App. C, p. 13A fn. 1).

The Trial Examiner, focusing upon the third paragraph of the Rumbley letter, emphasized Rumbley "purported to speak to the employees not in the language of prediction but of hard facts" (App. C, p. 36A). He concluded, on the basis of Rumbley's testimony, that Rumbley was "misstating" facts and "misleading the employees" because he concluded that (1) Rumbley did not use the word "normally" in his letter to characterize the sole source customers; (2) that Rumbley had only been informed of potential loss of business by three of its sole source customers and thus the use of the word "many" was not proper; (3) Rumbley had been so informed by these customers only after he told them of the impending election; and (4) none of the customers threatened to drop petitioner altogether if it were unionized (App. C, p. 36A). He conceded that the Rumbley letter was not a *per se*

violation of the Act. He rejected petitioner's contention concerning the union's opportunity to reply as a factor stating "a reply could have done nothing to remove the fear engendered by the threat contained in the letter" (App. C, pp. 37A-38A). Considering himself bound by Board, not court, decisions, he then considered the circular and the booklet, and concluded (App. C, p. 40A):

> "Taken together, Rumbley's letter, the circular, and the booklet were intended to convey to the employees the message that unionization would not only be futile but could only lead to strikes, loss of income, and violence. The Board has repeatedly held that propaganda stressing the futility of union organization with consequent strikes and loss of employment violated Section 8(a)(1) of the Act. . . ."[14]

Two members of the Board panel which decided the case upheld these findings and conclusions unchanged. Member Zagoria, however, did not find the letter, the circular, or the booklet to be bases for finding a violation (App. C, p. 13A fn. 3):

> In regard to the surveillance, the Trial Examiner's

[14] The Trial Examiner had earlier referred to considering "the impact of the letter . . . in the context of the whole of the respondent's conduct" (App. C, p. 35A) and "the context of many other unfair labor practices" which "underlined the threat clearly contained in Rumbley's letter that unionization would lead to the loss of employment" (App. C, pp. 37A-38A), but it is clear by the language of his ultimate conclusion quoted above that these asides formed no part of his rationale under which he found the letter to violate the Act.

findings and conclusions were adopted totally by the Board. The Trial Examiner credited "the testimony of Paul and Jenkins insofar as it explains their presence near the union hall" (App. C, pp. 31A-32A), but concluded that they "lingered on the scene in order to keep the union meeting under surveillance" in violation of the Act. He rejected their explanation that they remained so as to be able to get to talk to Bond because "I am unable to summon up the requisite degree of naivete to credit this part of their story" (App. C, p. 32A), stating it was difficult, if not impossible, to understand" why they took no further immediate steps to attract the attention of someone inside the building. Having rejected this, he inferred that the waiting "could only have been to keep the union hall under observation" because this was "a golden opportunity to learn who was attending union meetings (App. C, p. 32A). He discredited their testimony that they had not discussed the union that day because to his mind there was "no doubt that Jenkins would hardly have failed to comment to Paul" about the meeting and the entry of employees into the union hall. He also discredited Paul's direct denial if knowledge of Jenkins' anti-union committee role because Jenkins "testified that *everyone* knew he was against the union, and of course everyone would include Paul" (App. C, p. 33A). This incredible conclusion was drawn in spite of the testimony of Missildine, an activist in the union drive, who testified he did not know of Jenkins' role and in spite of the testimony by a union committee chairman, Marston, who stated it was not until a month and a half after this meeting that he learned of Jenkins' role on the anti-union committee, pp. 22, 23, *supra*. The Trial Examiner could not understand the "irony"

of Paul offering to autograph the written note of someone who took the license number of Paul's car "except in the context of the union situation and the union meeting," and inferred from Paul's admission of this remark that "Paul himself really admitted that he knew there was a union meeting in progress that day" (App. C, pp. 33A, 34A). The Trial Examiner's final ridiculous inference was from the testimony that Paul and Jenkins returned Marston's wave to them. From this he inferred that knowledge on the part of Paul and Jenkins that a union meeting in progress was "established conclusively" (App. C, p. 34A).[15]

III. The Decision Of The Court Of Appeals

The Court of Appeals originally enforced the Board's order entirely, but, on rehearing, found the circular and booklet to be lawful propaganda protected by Section 8 (c) of the Act.[16] The Court referred to the "supported by the record as a whole" rule of Section 10(e) of the Act and stated that "the primary function of this Court" was to determine "whether the Board has

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[15] The Trial Examiner mentioned the fact that Marston had been discharged the previous day in drawing this inference, but no cogent reason exists for his reliance thereon. Marston was employed in the assembly department under the supervision of foreman Whitmire; Paul was the foreman of the machine shop and Jenkins worked in that shop. McBride, the plant superintendent, discharged Marston; Paul and Jenkins were not involved. No knowledge on their part on December 18, 1966, of Marston's discharge was shown. They were not even asked if they knew about it!

[16] The Court also narrowed the scope of the Board order so that it forbid "like or related" acts by petitioner rather than forbidding all "other" future conduct which could conceivably be a violation.

exercised a 'reasonable' discretion in light of the circumstances of the individual case" (App. A, p 2A).

In regard to petitioner's due process contention, the Court concluded that there was not "(u)nder these circumstances ... an abuse of discretion by the Examiner." The "circumstances" relied upon were (1) "counsel for General Counsel denied the charge"; (2) although a "right to renew the motion at the close of the General Counsel's case" was given, the "Company failed to renew the motion;" (3) the Company did not heed the advice given three days before trial to direct its motion to the Regional Director and the "(f)ailure to do this led to the assembling of all the witnesses, parties and counsel" from three states and the District of Columbia for the hearing (App. A, p. 8A).

The Court reached these conclusions despite the facts that (1) no testimony was allowed to determine if the assertion of petitioner was true, but rather only assertions of counsel were made on the issue; (2) renewal was an empty remedy because petitioner sought *pre-trial* relief to allow lawful preparation *prior* to having to cross-examine the witnesses against petitioner and prior to those witnesses being overwhelmingly committed psychologically by their public testimony under oath before that testimony was subjected to vigorous pre-trial scrutiny by an adverse party; (3) petitioner was specifically advised it could make its motion to the Trial Examiner as provided by Board Regulations, and (4) the fact that all persons were present who were necessary to conduct an appropriate pre-trial hearing to determine the merit of petitioner's allega-

tions and to give such relief prior to trial as was shown to be appropriate.[17]

The Court did not consider or decide whether (1) the allegations and offer of proof by petitioner stated a *prima facie* case of denial of due process; (2) whether pre trial statement of a *prima facie* denial of due process, together with a motion for an evidentiary proceeding in which to prove the actual merit of the allegations required that the Trial Examiner hold such an evidentiary proceeding; (3) whether the alleged error was of such a nature it must be considered inherently prejudicial if true; or (4) whether the alleged error was of such a nature that merely an examination of the record need be made at the appellate level to determine if there was prejudice and the extent of that prejudice; or (5) whether examination of the record should adequately support a conclusion that the error, if any, was harmless beyond a reasonable doubt.[18]

As to the Rumbley letter the Court concluded that it "bases assertion of job insecurity on overstatements, half truths, and overt misrepresentations" (App. A,

[17] Counsel is baffled by the reliance on the gathering of the witnesses, parties and counsel as a justification for the denial. If a motion had been made to the Regional Director, the granting of that motion would have necessitated a separate evidentiary hearing on the merits of the petitioner's allegations in addition to the trial itself, thus causing *two* gatherings to occur.

[18] The Court did state that "(a) review of the record does not reveal that the action hindered the cross-examination or preparation of Company counsel to any significant extent" (App. A, p. 8A). The opinion does not disclose the extent or nature of this "review" nor was what the Court would consider to be a "significant" hindrance articulated.

p. 5A). It stated that the union "could not properly respond" to the letter "due to lack of adequate knowledge of the correct facts."[19] (App. A, p. 5A).

The Court then concluded that this propaganda thus violated the principles previously established by it in two of its prior cases, thereby tending "to 'impede and coerce' employees" and therefore constituting an unfair labor practice under the authority of another of its cases.

The Court adopted the finding that Paul and Jenkins legitimately went to Prattville on a personal errand, adopted the conclusion that their continued presence was "wholly unexplained," and held that "it was not unreasonable" for the Board to find that these men "knew there was a Union meeting in progress and that they 'lingered there in order to keep the meeting under surveillance and thus violated Section 8(a) (1) of the Act'" (App. A, p. 4A).

REASONS FOR GRANTING THE WRIT

This case presents a substantial question concerning the denial of due process in administrative proceedings arising from denial of appropriate pre-trial relief when the trial preparations of counsel are inhibited by improper advice from the prosecuting attorney to pros-

[19] This suggests that if the union had the facts, it could adequately respond. No union attempt of any kind to get the facts was shown although *two weeks* were available before the election to get them and disseminate them to the employee electorate, with the full resources of a powerful national union available for this endeavor.

pective witnesses and thus questions should be decided by this Court. The case also involves such a substantial departure from the normal procedures required in a fundamentally adversary administrative hearing that this Court should not allow the question of such a departure to go uncorrected. There has been extensive litigation in recent years concerning an employer's right of free speech under Section 8(c) of the Act as it implements the First Amendment with the decisions of the Courts of Appeals and the Board still in substantial conflict as to the extent of that right. These limits are vital in the administration of the Act and the conduct of labor election campaigns and this Court should further clarify and define the limits of that right. The decisions of the Courts of Appeal and the Board are in conflict on the right of employer managerial personnel to travel freely without engaging in unlawful surveillance, especially concerning the quantum of evidence as opposed to inference necessary to provide substantial support for a finding of unlawful surveillance and a decision by this Court on this question is important to the administration of the Act.

I. The Decision Is In Conflict With Decisions Of Other Circuits And Of This Court Concerning The Denial Of Due Process Caused By The Restriction Of Petitioner's Counsel's Right To Prepare For Trial

A. THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS A DUE PROCESS RIGHT GUARANTEED TO PETITIONER BY THE

CONSTITUTION, THE ACT, AND THE BOARD REGULATIONS

The National Labor Relations Board, in the fulfillment of its duty to prevent and correct unfair labor practices, performs an adjudicatory function. In its adversarial administrative hearings concerned with the determination of whether an employer has committed unfair labor practices in violation of the Act, the Board is required to adhere to due process requirements. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938). These requirements include "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature," *Morgan v. United States*, 304 U.S. 1, at 19, 58 S.Ct. 773, at 777, 82 L.Ed. 1129 (1938), and "those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process." *Joint Anti Fascist Refugee Committee v. McGrath*, 341 U.S. 123, at 168, 71 S.Ct. 624, at 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

Due process requirements "comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, at 69, 53 S.Ct. 55, at 64, 77 L.Ed. 158 (1932). This right is "fundamental" and its denial violates due process. *Great Lakes Screw Corp. v. N.L.R.B.*, 409 F.2d 375 (7th Cir. 1969). "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McCann v. Richardson*, ___ U.S. ___, 25 L.Ed.2d 763, at 773, fn. 14, 90 S.Ct. ___ (1970). The effective assistance of counsel requires time be-

fore trial for counsel to engage in "consultation, thorough-going investigation and preparation". *Powell v. Alabama*, 287 U.S. 45, at 57, 53 S.Ct. 55, at 59-60, 77 L.Ed. 158 (1932).

B. INTERFERENCE BY THE PROSECUTING COUNSEL WITH THE INTERVIEWING OF PROSPECTIVE WITNESSES BY COUNSEL FOR PETITIONER IS A DENIAL OF DUE PROCESS ESPECIALLY IN A BOARD PROCEEDING WHERE MOST OTHER METHODS OF DISCOVERY ARE NOT AVAILABLE.

The normal modes of discovery in civil proceedings, see Rules 26-37 of the Federal Rules of Civil Procedure, are not available in Board proceedings. Although some means of discovery exist, their exercise is not a matter of right, but rather they can be utilized only upon authorization which can be withheld on a discretionary basis without committing error. *N.L.R.B. v. Safway Steel Scaffolds of Georgia*, 383 F.2d 273 (5th Cir. 1967), cert. denied 390 U.S. 955 (1968). An employer accused of an unfair labor practice does not have a pre-trial right to examine the statements given by prospective witnesses to Board investigators. *N.L.R.B. v. Clement Bros. Co.*, 407 F.2d 1027 (5th Cir. 1969). The only effective, available method to prepare defenses for a hearing is to conduct pre-hearing interviews of possible witnesses. It has been widely recognized in both the federal and state courts that this right to interview witnesses is a constitutional right. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *Coppo-*

lino v. Helpern, 266 F.Supp. 930 (S.D. N.Y. 1967); *United States v. Powell*, 156 F.Supp. 526 (N.D. Cal. 1957); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E. 2d 308, 14 ALR 3d 640 (1965); *Bobo v. Commonwealth*, 187 Va. 774, 48 S.E. 2d 213 (1948); *Kastiel v. Superior Court*, 162 Cal. App. 2d 710, 328 P.2d 476 (1958); *State v. Papa*, 32 R.I. 453, 80 Atl. 12 (1911); *Leahy v. State*, 111 Tex. Crim. 570, 13 S.W. 2d 874 (1929); *State v. Wilson*, 93 Ga. App. 229, 91 S.E.2d 201 (1956); *White v. State*, 52 Miss. 216 (1876). It is also well recognized that interference with or denial of this right by the government is a denial of due process of law.

Thus, in *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966), the prosecutor advised witnesses not to speak to anyone unless he was present and the witnesses thereafter declined to talk to defense counsel. Requests both prior to trial and at trial to have the court properly advise the witnesses that they were free to talk to defense counsel without the prosecutor if they desired were denied. The advice of the prosecutor and the failure of the courts to correct it were found to be reversible error. The court stated:

> "... Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which, not only the statute, but *elemental fairness and due process required* that he have.
>
> ...

"... But we know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence....

"... A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined.... It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview. In our judgment the prosecutor's advice to these eye witnesses frustrated that effort and denied appellant a fair trial." (369 F.2d at 188-189; emphasis supplied).

In *Coppolino v. Helpern*, 266 F.Supp. 930 (S.D. N.Y. 1967), Helpern, the New York City Medical Examiner, instructed his subordinate not to talk to defense counsel, although the subordinate was otherwise willing to do so. Coppolino sued under the Civil Rights Law to enjoin such conduct by Helpern and injunctive relief was granted. The court stated:

"... What is at stake here is whether a state official, acting under color of state law, can obstruct and interfere with the efforts of defense counsel in a criminal case to interview the state's witnesses or his own prospective witnesses.

...

"We merely say that, as to interviewing a prospective prosecution witness, our constitutional notions of fair play and due process dictate that defense counsel be free from obstruction, whether it comes from the prosecutor in the case or from a state official of another state acting under color of law.

...

"... Defendant Helpern by his conduct has violated the *constitutional rights of the defendant to a fair trial and effective counsel.* The right to effective counsel embraces more than just the right to retain counsel.

"This right to employ and be represented by counsel involves as a corollary the obligation of the state not to deprive the accused of the effective exercise of such right, by pressing the criminal proceedings either without affording him a reasonable opportunity to secure such counsel or without affording counsel a reasonable time in which to consult with his client, investigate the case, secure witnesses, and otherwise map out the defense." (266 F. Supp. at 935-936; emphasis supplied).

In *United States v. Powell*, 156 F.Supp. 526 (N.D. Cal. 1957), the defense was prevented from interviewing necessary defense witnesses in North Korea and mainland China by U. S. passport regulations. The court held that the defendants were "deprived of their constitutional rights of due process and fair trial" by these restrictions of the prosecuting government which effectively prevented defense counsel from gathering defense evidence.

In *Commonwealth v. Balliro*, 209 N.E. 2d 308 (Mass. 1965) the court upheld the right of defense to interview witnesses held in protective custody by the state, reversing because of a denial of this right.

Thus; there is a clear due process right on the part of petitioner to interview witnesses prior to trial through its counsel without interference by a prosecuting agent of the adjudicatory body. The reverse of the employer's right is recognized in Board proceedings, for it is an unfair labor practice for an employer to tell his employees that they do not have to talk to Board agents. *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565 (2d Cir. 1967). The effect of such advice that petitioner's counsel were engaging in illegal conduct by interviewing witnesses, given by a government agent cloaked with the full authority and suasion of his office to rank and file employees, is hardly open to question. It as effectively suppresses a means by which to obtain evidence as would have a directive not to talk to petitioner's counsel unless the Board attorney was present, for no employee would desire to participate in what an official government

agent characterized as an illegal act, as is shown by the fact that the employee questioned about this advice refused to talk although he had previously participated in such an interview.

C. THE TRIAL EXAMINER SHOULD HAVE CONDUCTED A PRE-TRIAL EVIDENTIARY HEARING ON PETITIONER'S MOTION.

The allegations of petitioner's counsel and his offer of proof concerning the actions of Mr. McGrath plainly stated a *prima facie* claim showing a possible denial of due process. The answering counter-allegations of Mr. McGrath and his denial of any wrongdoing clearly created a substantial issue of fact. Clearly petitioner's counsel requested a pre-trial evidentiary hearing to resolve the disputed issues of fact concerning whether the alleged advice was in fact given and if it was, the extent of harm resulting therefrom and the appropriate remedy therefor. All persons — counsel, parties, witnesses and Examiner — who were necessary to conduct such a hearing were present and available. The pre-trial nature of petitioner's rights required a pre-trial hearing for the hearing must be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, at 552, 14 L.Ed.2d 62, at 66, 85 S.Ct. 1187 (1965). Only a pre-trial evidentiary hearing before petitioner's pre-trial rights were cut off could provide petitioner "with procedural due process." Cf. *Goldberg v. Kelly*, ___ U.S. ___, 25 L.Ed.2d 287, at 297, 90 S.Ct. ___ (1970); *Sniadach v. Family*

Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969).

This case emphasizes the truth of the observation in *Joint-Anti Fascist Refugee Committee v. McGrath*, 341 U.S. 123, at 179, 71 S.Ct. 624, at 652, 95 L.Ed. 817 (1951) (Douglas, J., concurring):

> "It is procedure that spells much of the difference between rule by law and rule by whim and caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

The denial of a hearing ran contrary to the direction given in *Bokat v. Tidewater Equipment Co.*, 363 F.2d 667, at 673, fn. 12 (5th Cir. 1966) that "(w)ide latitude should be accorded in receiving evidential factual support for the Employer's contention" concerning an alleged "denial of due process resulting from the inhibitory effect on the prehearing investigation" of an allegation that the employer's prehearing investigation was being unlawfully conducted.

D. THERE WAS NO WAIVER BY PETITIONER'S FAILURE TO RENEW ITS MOTION.

There is a presumption against waiver of the constitutional right of due process. *Brookhart v. Janis*, 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966). There must be an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304

U.S. 458, at 462, 82 L.Ed. 1461, at 1466, 58 S.Ct. 1019, 146 A.L.R. 357 (1938). Petitioner had already thrice made an "ample and timely (motion) to bring the alleged federal error to the attention of the trial court (to) enable it to take appropriate corrective action" and that was "sufficient to preserve the claim for review here." *Douglas v. Alabama*, 380 U.S. 415, at 422, 13 L.Ed.2d 934, at 939, 85 S.Ct. 1074 (1965). The further participation in the hearing was not a waiver under the Board's Regulations, 29 C.F.R. §§ 102.28, 102.41, pp. 6, 7, *supra*, nor under Rule 46 of the Federal Rules of Civil Procedure, pp. 7-8, *supra*, see *Ulm v. Moore-McCormack Lines, Inc.*, 115 F.2d 492, at 494 (2d Cir. 1940), cert. denied 313 U.S. 567 (1941), which is applicable in Board hearings under Section 10(b) of the Act, 29 U.S.C. § 160(b), p. 5, *supra*.

E. PETITIONER WAS PREJUDICED BY THE DENIAL OF PRE-TRIAL RELIEF.

The prejudicial effect of the error here is plain. Petitioner's counsel had other witnesses he wanted to interview, but was inhibited by the allegations concerning the unlawfulness of his conduct. In view of his ethical duties to uphold, not break, the law, his prior experience, see fn. 7, *supra*, and his specialized labor relations practice, the inhibitory effect is clear. He was, as a result, denied possible pre-trial discovery of evidence. A showing of exactly what that evidence would have been or if there would have been any at all is not necessary for now it cannot be known what would have been found by an uninhibited investigation

prior to trial. *Powell v. Alabama*, 287 U.S. 45, at 48, 53 S.Ct. 55, at 60, 77 L.Ed. 158 (1932); *Reynolds v. Cochran*, 365 U.S. 525, at 531, 5 L.Ed. 2d 754, at 758, 81 S.Ct. 723 (1961). The strengthening of the resistance to cross-examination of adverse witnesses is another probable prejudice, for any inclination to be evasive, forgetful, taciturn, or even untruthful cannot but be heightened when the cross-examining attorney has been branded a lawbreaker.

The court in *Commonwealth v. Balliro*, 209 N.E.2d 308, at 315-316 (Mass. 1965) spoke directly to the point of prejudice:

> "... What the posture of the defence would have been if the interviews had been granted is within the realm of conjecture....
>
> "We do not know what [the witnesses'] testimony might have been or what other evidence might have been introduced if defense counsel had had the benefit of pre-trial interviews. The Commonwealth argues in effect that the defense must sustain a burden of establishing what might have been when the Commonwealth by its own action has rendered the sustaining of such a burden difficult if not impossible. Nor is there any greater persuasiveness to the contention that the interviews could have been 'fishing expeditions.' Pejoratives of this sort are no answer. It is too plain to be labored that the interviewing of prospective witness is

an essential part of the preparation of a case for trial."

On this record, with no facts adduced even to determine whether the alleged harm occurred, much less the full extent of it, but with a plentitude of expert psychological studies to show the prejudicial effect of allowing witnesses to testify without being subjected to rigorous pre-trial interviews, see fn. 6, *supra*, and in view of the other considerations outlined above, any possibility that a review of the record in its present form could justify a conclusion, see fn. 18, *supra*, that the alleged error was harmless beyond a reasonable doubt is totally negated. *Cf. Chambers v. Maroney*, ... U.S. ..., 26 L.Ed.2d 419, 90 S.Ct. ... (1970).

This Court should review and set aside the decision of the Court and Board below because of the denial of petitioner's due process rights and in order to establish and secure for all those accused of unfair labor practices the rudimentary due process right to prepare for trial without prejudicial interference with that preparation from the chilling effects of an unfounded allegation of illegal attorney conduct.

II. The Decision Herein Is In Conflict With Decisions Of Other Circuits And In Conflict With Decisions Of This Court With Respect To Petitioner's Exercise Of Its Constitutional And Statutory Right Of Freedom Of Speech.

The Court below found that the letter from sales manager Rumbley violated Section 8(a)(1) of the Act because it:

"... based assertion of job insecurity on conscious overstatements, half truths, and overt misrepresentations. Such pre-election propaganda, to which the Union could not properly respond due to lack of adequate knowledge of the correct facts, violates the principles announced in *N.L.R.B. v. Houston Chronicle Publishing Co.*, 300 F.2d 273, 277 (5th Cir. 1962) and *National Cash Register Company v. N.L.R.B.*, 415 F.2d 1612, [No. 26175, 5th Cir., slip opinion dated August 20, 1969], and tends to 'impede and coerce' employees and therefore constitutes an unfair labor practice. *N.L.R.B. v. Nabors*, 196 F.2d 272, 276 (5th Cir. 1952), cert. denied, 344 U.S. 865." (App. A, p. 5A).

The Court did not focus on the interplay of Section 8(c) and Section 8(a)(1) as they relate to finding an *unfair labor practice* when an employer makes "a prediction as to the precise effects he believes unionization will have on his company" and that prediction is "carefully phrased on the basis of objective fact to convey (the) employer's belief as to demonstrably probable consequences beyond his control," as differentiated from the situation where there is an "implication that (the) employer may take action solely on his own initiative for reasons unrelated to economic necessities and known only to him." *Sinclair Co. v. N.L.R.B.*, 395 U.S. 575, at 618, 23 L.Ed.2d 547, at 580, 581, 89 S.Ct. 1918 (1969). It ignores the fact that Section 8(c) of the Act "merely implements the First Amendment" and that "an employer's free speech right to communicate his views to his employees is firmly es-

tablished and cannot be infringed by ... the Board." *Sinclair Co. v. N.L.R.B.*, 395 U.S. 575, at 617, 12 L.Ed.2d 547, at 580, 89 S.Ct. 1918 (1969).

Petitioner, unlike the Sinclair Company, did not threaten to take retaliatory action. Petitioner did not control its purchasers and was powerless, except through the exercise of sales persuasion backed by a record of selling dependable products at reasonable prices, to force these customers to continue to buy all their axles from petitioner. It was not to petitioner's interest to lose sales and there was no intimation that it would cease to put forth its best efforts to continue to get the purchases. There was certainly no threat in the letter to close the plant. The "totality" approach used by the Board, of considering the letter, the circular, and the booklet as together amounting to a violation, was not used by the Court, and, in any event, was vitiated by the Court's finding on rehearing that the circular and booklet were protected by Section 8(c) of the Act.

Petitioner does not believe that this Court intended any departure from the rule that the right of free speech should be guarded from "an unnecessarily restrictive attitude toward employer communications." *N.L.R.B. v. Automotive Controls Corp.*, 406 F.2d 221, at 223 (10th Cir. 1969); that "its exercise should not be narrowly restricted." *Colonial Corp. of America v. N.L.R.B.*, ___ F.2d ___, 74 LRRM 2115, at 2118, 62 LC ¶ 10, 890 (6th Cir. 1970); and that "the utterances ... in an election campaign ought not to receive a narrow or strained construction." *Union Carbide*

Corp. v. N.L.R.B., 310 F.2d 844, at 845 (6th Cir. 1962).

As this Court long ago stated in *Shenk v. United States*, 249 U.S. 47, at 52, 39 S.Ct. 247, at 249, 63 L.Ed. 470 (1919):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had a right to prevent."

As this Court has recently emphasized, *Watts v. United States*, 394 U.S. 705, at 707, 708, 22 L.Ed.2d 664, at 667, 89 S.Ct. 1399 (1969):

> "(A) statute . . . which makes (illegal) a form of pure speech must be interpreted with the command of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech. . . .
>
> "The language . . . used in labor disputes, see Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58, 15 L.Ed.2d 582, 587, 86 S.Ct. 657 (1966), is often vituperative, abusive and inexact."

In *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, at 62, 15 L.Ed.2d 582, at 589, 590, 86 S.Ct. 657 (1966), this Court viewed Section 8(c) as manifest-

ing "a congressional intent to encourage free debate on issues dividing labor and management" with this debate to be "uninhibited, robust, and wide open," and one in which even "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." Under this freedom of speech, since "(i)t is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available." *Southwire Co. v. N.L.R.B.*, 383 F.2d 235, at 241 (5th Cir. 1967), the freedom to speak should receive a liberal construction if the preferred election process is to have real meaning.

Petitioner urges that the record below shows only prediction and prophecy concerning customer reaction to "unionization itself" and as such should be protected speech. *P. R. Mallory & Co. v. N.L.R.B.*, 389 F.2d 704, at 707 (7th Cir. 1967); *G.P.D., Inc. v. N.L.R.B.*, 406 F.2d 26 (6th Cir. 1969). A prediction almost identical to petitioner's letter was found protected by Section 8(c) in *Union Carbide Corp. v. N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962) where the employer stated:

> "Customers are buying products on the basis of prices, delivery, and dependability. The facts are that in some cases we are the sole source of supply at present for some of our customers. We have been told that we would not continue to be the sole source of supply if we become unionized, due to the ever present possibility of a work stoppage due to strikes or

walkouts." (310 F.2d at 845, emphasis supplied).

In that case the Board found that the employer "materially misrepresented the facts" when it said "some" of its customers would seek other suppliers, whereas only one had done so, and it "failed to name the customers involved or supply any other information". *Haynes Stellite Co., Div. of Union Carbide Corp.*, 136 NLRB 95, at 97 (1962).

The information which petitioner set forth in the letter was substantially accurate in all respects. The customers could, with complete justification, be called sole source, as they did purchase all their axles from petitioner unless to do so would cause them in turn to lose sales because of customer specifications and even then they often attempted to get the specifications changed. This type of customer did purchase 70% of petitioner's axles. The named customers accounted for 12 [illegible] of petitioner's sales (not just those to the sole source type of customer), and, in addition, there were numerous other customers of the sole source type who had informed petitioner over the years that they would cease to purchase from petitioner if it were unionized. The employees should be entitled to know this information, and petitioner should be entitled to tell them, so they may give it whatever weight they chose in exercising their elective right.

The Court should review the decision of the Board and Court below and further define the parameters of free speech in the pre-election setting where "speech

may be fought with speech," *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, at 396, 70 S.Ct. 674, at 683, 94 L.Ed. 925 (1950), especially when the communication involved is not a threat to take some retaliatory action in some matter where the employer can make his threat come true (plant closure) but is rather a substantially accurate statement of the predictable effects of unionization based on actual information conveyed to the employer by his customers. The "outer limits" of the "conscious overstatement" and "brinksmanship" rules postulated previously by this Court have not yet been "marked out through case by case adjudication," *cf. St. Antoine v. Thompson*, 390 U.S. 727, at 730, 20 L.Ed.2d 262, at 267, 88 S.Ct. 1323 (1968), but the definition of those "outer limits" is a substantial question in the administration of the national labor laws. This Court should take this opportunity to further mark those limits and to resolve the present conflict between the Fifth Circuit and the Sixth, Seventh and Tenth Circuits concerning the boundaries of legitimate employer predictions.

III. The Decision Below Is In Conflict With Decisions Of The First, Eighth And District Of Columbia Circuits And With Decisions Of The Board Itself In Regard To The Alleged Surveillance And Cannot Be Justified Under The Substantial Evidence Of The Record As A Whole.

The Court below adopted wholesale the facile approach of the Board, based entirely upon inferences and surmises which were predicated one upon another

culminating in a holding that, because the explanation given by Paul and Jenkins justifying their continued presence near a union meeting was rejected, their presence had to be for an unlawful purpose regardless of the initial legitimacy of their presence. The decision below requires that once a supervisor learns he is in a place where he *might* be able to observe a union meeting he must flee that place, regardless of his reason for coming there or for staying.

In *N.L.R.B. v. Davidson Rubber Co.*, 305 F.2d 166, at 169 (1st Cir. 1962) the court noted that "the Board has been exhibiting an extraordinary sensitivity on the subject of surveillance." It refused to find that a supervisor violated the Act by looking through the window of his house at a union meeting held next door. The court said that:

> Seemingly, one's house is one's castle only so long as one does not look out the window. If the union does not want to be seen, it does not need to go next door, and the Board should tell it so rather than cast reflections upon a party's not unnatural curiosity properly exercised in his own home." (305 F.2d at 170).

In *Montgomery Ward & Co. v. N.L.R.B.*, 385 F.2d 760, (8th Cir. 1968), four supervisors following their normal practice met at a table in the beer parlor portion of a bowling alley. This meeting was at a time when they knew a union organizing meeting would be held in another portion of the same premises. The supervisors saw and exchanged greetings with some

of the employees who passed by on their way to the union meeting. The court concluded:

> "The supervisors were at a public place where they had a right to be and were using the facility for its intended purpose. Such activity does not constitute unlawful surveillance."

In *Amalgamated Clothing Workers v. N.L.R.B.*, 371 F.2d 740 (D.C. Cir., 1966), the court adopted a Board finding of no surveillance either when a supervisor twice drove slowly past a union meeting on a legitimate errand nor when another supervisor had dinner at the only restaurant in town while a union meeting was going on in a private dining room there.

In *Bonham Cotton Mills*, 121 NLRB 1235 (1958), two supervisors parked half a block away from a union meeting, remained there a half-hour while employees went in and out of the union hall during the meeting, and remained there while employees determined who they were. Finding that they were present on a legitimate errand, the Trial Examiner, whose decision was adopted by the Board, concluded the evidence did not "negate other possible (lawful) reasons why they stayed," and refused to find "even a prima facie case of surveillance" because such "would tend 'to curtail the right of mill management to go into town on Saturday.'" (121 NLRB at 1268-1269).

In *Universal Packaging Corp.*, 149 NLRB 262, at 263-264 (1964) a supervisor, without prior knowledge of the union meeting went to a motel for dinner while a union meeting was being held, and *did not leave*

after learning of it. Finding no evidence his presence "was anything other than coincidental" the Board dismissed the charge of surveillance.

In *Atlanta Gas Light Co.*, 162 NLRB 436, at 438 (1966) the Board held that the "mere presence" of a supervisor near a union meeting does not establish unlawful surveillance "without more specific evidence that it was not for a legitimate purpose, or that it was for the purpose of observing the meeting." In that case the supervisor was observed looking at employees meeting at a bowling alley, was invited into the meeting and then told to leave the meeting, and then remained on the premises and bowled. The Board dismissed the charge of surveillance, stating it could not find any "reasonable basis for an impression of surveillance."

In *Home Comfort Products Co.*, 180 NLRB No. 89, 73 LRRM 1032, 1969 CCH NLRB ¶ 27,556 (1970) the Board found no unlawful surveillance where (1) three company officials, *who knew of the scheduled union meeting*, stopped nearby to get gas, refused to leave the area when two union officials accused them of surveillance, and remained in the area even longer thereafter having coffee at a spot from which they could have observed the union meeting or (2) on the same day a company official, *who had prior knowledge of the scheduled union meeting*, stopped at a gas station nearby for the purpose of trying to buy sunglasses, and then drove by the union meeting place on his way home. The Board concluded that, even as suspicious as these circumstances were, it was obviously well within the realm of probability that these company

officials had legitimate business in the business district of the small town, and concluded that the General Counsel had failed to establish an intent to engage in unlawful surveillance.

In regard to Paul and Jenkins, the record below shows only their "mere presence" in a public place on a legitimate errand which was merely "coincidental" with a union meeting. The unwarranted inferences drawn by the Trial Examiner ignore all the record evidence which fairly weighs against his conclusions. He finds, based solely on his own apparent predilection for wrong doing, that he must deny the innocent explanations which are too strange for his philosophy because they are "difficult, if not impossible, to understand", because he has "no doubt" based on his own conjecture that anyone would reject such "a golden opportunity", because he does not have "the requisite degree of naivete" to accept a simple explanation, because in his mind the "only" explanation possible was one establishing unlawful conduct, because a remark which seemed to him "irony" was only explicable "in the context of the union situation" and because an exchange of hand waves "established conclusively" an illegal act. These unwarranted inferences, assumptions, and surmises cannot amount to substantial evidence on the record as a whole. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

"Board decisions are not written solely for the benefit of the parties; they constitute a living body of law to guide the conduct of employers, employees, and unions throughout the nation." *United Auto Workers*

v. N.L.R.B., ____ F.2d ____, 74 LRRM 2481 at 2483, 63 LC ¶ 10,943 (6th Cir. 1970).

This Court should review this finding of the Board and Court below to resolve the conflict between the Fifth Circuit and the First, Eighth, and District of Columbia Circuits on this issue and to provide proper guidance to the Courts below and to the Board to prevent infringement of the exercise by employers and their representatives of their right freely to travel to public places and to require evidence to support a finding of an unfair labor practice rather than mere inference, conjecture and surmise.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

ERLE PHILLIPS
Counsel of Record

WILLIAM W. ALEXANDER, JR.
26 Pryor Street, N.E.
Atlanta, Georgia 30303
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this ___ day of August, 1970, caused the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to be served upon the following individuals as counsel for parties to the case below at the addresses shown below by causing 3 copies thereof for each such party to be deposited in the U. S. Air Mail, postage prepaid:

Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Attention: Norton J. Come, Esq.
Marcel Mallet-Prevost, Esq.
Nancy M. Sherman, Esq.

Erwin N. Griswold, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

ERLE PHILLIPS
Counsel of Record
for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27161
Summary Calendar

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

STANDARD FORGE AND AXLE COMPANY, INC.,
Respondent.

Application for Enforcement of an Order of the
National Labor Relations Board (Alabama Case)

(October 22, 1969)

Before THORNBERRY, MORGAN and CARSWELL,
Circuit Judges.

CARSWELL, Circuit Judge: Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v. Houma Well Service*, 409 F. 2d 804, Part I (5th Cir. 1969).

This is an Application for Enforcement of a Board Order directing the respondent Company to cease and desist, to post appropriate notices and to offer discharged employees reinstatement. We enforce.

The Board found that the Company violated Section 8(a) (1) of the Act by interrogating employees concerning their Union activities and voting intentions, by threatening its employees with loss of work opportunities and privileges in reprisal for Union activities, by suggesting to its employees that they could obtain satisfaction of their grievances by abandoning the Union and dealing directly with the Company, and by keeping a Union meeting under surveillance. The Board further found that the Company violated Section 8(a) (3) and (1) of the Act by discharging employees William E. Cannon, Clarence R. Litoker and Roy A. Marston because of their Union activities.

It is well settled that the findings and conclusions of the Board, when supported by the record as a whole, will not be disturbed on appeal. 29 U.S.C. §160(e). The primary function of this Court in reviewing Board decisions is a determination of whether the Board has exercised a "reasonable" discretion in light of the circumstances of the individual case. See *Pepperell Manufacturing Co. v. N.L.R.B.*, 403 F. 2d 520, 522 (5th Cir. 1968).

The record herein reveals that Company supervisors interrogated numerous employees concerning their Union activities and sentiments, specifically asking whether they favored the Union, planned to vote for

it, signed Union authorization cards or attended Union meetings. These inquiries are the type of "pointed questions" found coercive in *N.L.R.B. v. Camco, Inc.*, 340 F. 2d 803, 804-807 (5th Cir. 1965), cert. denied, 382 U. S. 926. These interrogations were frequently accompanied by thinly veiled inducements or threats: thus one foreman after his questioning had revealed that one Gillespie had signed a Union card, told him that a Superintendent had said "they would close down before they would operate under a union." Such threats and inducements plainly violated Section 8(a) (1) of the Act: *N.L.R.B. v. Coats & Clark, Inc.*, 231 F. 2d 559-70 (5th Cir. 1956); *N.L.R.B. v. Camco, Inc.*, supra. As to the Company's contention that the Examiner and Board should have believed its supervisors' denials that these statements were made, it is well settled that credibility resolutions are peculiarly within the province of the Trial Examiner and the Board and entitled to affirmance unless inherently unreasonable or self-contradictory. *N.L.R.B. v. Finesilver Mfg. Co.*, 400 F. 2d 644, 645 (5th Cir. 1968).

It is equally well settled that surveillance of a Union meeting by a company supervisor constitutes a violation of Section 8(a) (1) of the Act. *N.L.R.B. v. Bonham Cotton Mills, Inc.*, 289 F. 2d 902 (5th Cir. 1961); *N.L.R.B. v. Pine River Mills, Inc.*, 274 F. 2d 881 (5th Cir. 1960); *N.L.R.B. v. Compart, Inc.*, 395 F. 2d 867 (8th Cir. 1968); *N.L.R.B. v. A. R. Gieringer Tool Corp.*, 314 F. 2d 359 (7th Cir. 1963). See generally, *Hendrix Mfg. Company v. N.L.R.B.*, 321 F. 2d 100 (5th Cir. 1963). It is uncontroverted that Frazier Raul, a company supervisor, and Clarence Jenkins, a company employee actively

opposed to the Union, sat in an automobile parked near the union hall for at least 30 minutes while a meeting of company employees was in progress. Both men credibly testified that they came to Prattville on a personal errand — to collect a debt from Richard Bond, an employee working that day at Prattville Press, located near the Union Hall. However, this testimony leaves wholly unexplained the reason why, after Jenkins knocked at the newspaper's door and heard noises, Jenkins and Paul made no immediate attempt to attract the attention of anyone working at the office but, rather, were content to remain in the car for approximately 45 minutes before making any additional effort to see Bond.

Under these circumstances it was not unreasonable for the Board to find that Paul and Jenkins knew there was a Union meeting in progress and that they "lingered there in order to keep the meeting under surveillance and thus violated Section 8(a) (1) of the Act." See *N.L.R.B. v. Bonham Cotton Mills, Inc.*, supra.

In a pre-election letter the Company asserted that 70 percent of its business came from customers who purchased *all* their axles from Standard Forge and that *many* of these customers had informed the Company that, if the plant became unionized, Standard Forge would no longer be their sole source of supply "because of the ever present possibility of a work stoppage due to strikes or walkouts." However, in his testimony at the hearing after the Union had lost the election, the Sales Manager conceded that these customers did not purchase from the Company exclusively,

but sometimes purchased from competition. He also conceded that only three customers stated that they would purchase from competitors if the Union won. Thus the letter based assertion of job insecurity on conscious overstatements, half truths, and overt misrepresentations. Such pre-election propaganda, to which the Union could not properly respond due to lack of adequate knowledge of the correct facts, violates the principles announced in *N.L.R.B. v. Houston Chronicle Publishing Co.*, 300 F. 2d 273, 277 (5th Cir. 1962) and *National Cash Register Company v. N.L.R.B.*, ___ F. 2d ___, [No. 26175, 5th Cir., slip opinion dated August 20, 1969], and tends to "impede and coerce" employees and therefore constitutes an unfair labor practice. *N.L.R.B. v. Nabors*, 196 F. 2d 272, 276 (5th Cir. 1952), cert. denied, 344 U. S. 865.

In regard to the issue of the discharge of the three employees, this Court has held that the initial choice between two equally conflicting inferences of discriminatory or non-discriminatory employer motivation is primarily the province of the Board. This Court will not displace the Board's choice, if reasonable, between two fairly conflicting views even though this Court would have justifiably made a different choice at a *de novo* hearing. *N.L.R.B. v. Coats & Clark, Inc.*, supra, at 572; *N.L.R.B. v. Transport Clearings, Inc.*, 311 F. 2d 519, 523 (5th Cir. 1962).

Without reiterating the total background of each individual case, we find the Board's findings and conclusions to be reasonable, based upon the following facts.

Each of the discharged employees, Cannon, Litaker and Marston, were Union adherents and active Union supporters. Cannon and Litaker were, indeed, Union organizers. All three had excellent work records and had experienced no trouble prior to the Union organization drive. Each of these employees came under close "surveillance" by the Company as the Union drive gained strength.

Employee Cannon's job required the drilling of brake shoes. In theory his foreman was to bring him materials for his job. In practice, however, Cannon often went to obtain materials himself, and prior to his Union activity was never questioned about this. However, after the Union drive began, Company supervisors accused Cannon of going to the brake shed to discuss Union activity and questioned him about his Union activity. Four days before his discharge, Cannon was working his drill when it broke at the handle. He angrily tried to hammer it back in place. The machine was repaired and nothing was said about the incident. There was evidence that the machine had been broken before and that the bolt was weak. Cannon was fired for "laying-off" the job and destruction of Company property.

Employee Litaker was discharged after he reported sick one day but intended to work. By 11:40 he felt worse and sought his foreman to tell him he was going home. Unable to locate him he informed the timekeeper and left. Litaker was discharged for leaving the plant without his foreman's permission.

Marston was discharged for leaving his work area to go to "Artic Storage" for cigarettes without checking out. Marston's supervisor, Whitmire, testified that he knows of this practice by employees but never enforced the checkout rule.

All employees sought reinstatement but were refused. Evidence was introduced that discharges were rare and employees were almost always reinstated after a few days.

The Board's finding that the motivating cause of discharge was the Union activity of the three employees, under the above conditions, was not unreasonable even though there might have been a technically proper ground for discharge. *N.L.R.B. v. Hudson Pulp and Paper Corporation*, 273 F. 2d 660, 666 (5th Cir., 1960).

The Company contends that the Board denied it due process of law in that the Company has been denied effective assistance of counsel, has been denied the right to prepare for trial, present evidence and cross-examine witnesses all because of alleged interference with the Company's right to interview witnesses prior to trial.

Company counsel received a report that counsel for General Counsel McGrath had told employees that it was an unfair labor practice for the Company to interview them prior to trial. On the first day of the hearing the Company moved for a continuance so that the Trial Examiner or Regional Director could conduct an inves-

tigation of the charge. The counsel for General Counsel denied the charge and the Trial Examiner denied the motion after questioning the counsel for the General Counsel. The Trial Examiner granted the Company the right to renew the motion at the close of the General Counsel's case. The Company failed to renew the motion. Three days prior to this the Examiner had advised the Company to apply for a continuance with the Regional Director. This advice was not followed. Failure to do this led to the assembling of all the witnesses, parties and counsel from Washington, D. C., Florida, Louisiana, Alabama (Birmingham and Fairfield), to Montgomery, Alabama for the hearings. Under these circumstances we do not believe that the denial of a continuance was an abuse of discretion by the Examiner. See *N.L.R.B. v. American Potash & Chemical Corporation*, 98 F. 2d 488, 492 (9th Cir. 1938). A review of the record does not reveal that the action hindered the cross-examination or preparation of Company counsel to any significant extent.

The order of the Board is due to be and hereby is ENFORCED in all respects and particulars.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27161
Summary Calendar

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

STANDARD FORGE AND AXLE COMPANY, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Alabama Case)

(May 21, 1970)

ON PETITION FOR REHEARING

Before THORNBERRY and MORGAN,
Circuit Judges.*

PER CURIAM: Petitioner Standard Forge and Axle Company calls attention to the fact that this Court did not address itself to the question of the legality of

*Judge Carswell participated in the original decision but did not take part in the denial of this petition for rehearing.

two Company publications, directed toward employees, in our previous opinion. We now do so.

The Company distributed two pre-election publications along with the letter of February 9, 1967. One publication was entitled "An Important Message for You." Inside, there were reproductions of newspaper articles depicting strike violence along with statements reading: "Innocent People Suffer Most," "No Value on Human Lives," "Weeks Without Pay," "Investigation," "Double Cross" and "Thousands Idled." The other pamphlet was entitled "What The Union Can Do For You" and contained only blank pages.

We agree with petitioner that neither of these two publications can be raised to the level of an 8(a)(1) violation. The publication entitled "An Important Message For You" is permissible, though strong propaganda. There is no indication that the events depicted were not true or misrepresented. This publication is nothing more than a pessimistic prediction of what the employer thought unionism would lead to. Such predictions, within limits, are allowable. *Southwire Company v. N.L.R.B.*, 5th Cir. 1967, 383 F.2d 235. The pamphlet entitled "What The Union Can Do For You" was nothing more than a comic attempt to propaganda. Therefore, in regard to these and like publications the Board's order to cease and desist does not apply.

Likewise, the petitioner's argument that the Board's cease and desist order is too broad is well taken. The Board order calls for the Company to cease violations of the Act "in any other manner." As in *Southwire*

Company v. N.L.R.B., supra, the record does not warrant such prohibition of future conduct. We therefore limit the Board's Order to cease and desist to conduct of a "like or related manner" to that previously found to be violative of the Act.

The other points raised by petitioner do not merit reconsideration. Therefore, IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

DECISION AND ORDER

United States of America before the

National Labor Relations Board

Standard Forge and Axle Company, Inc.,

Cases Nos. 15-CA-2968

and 15-CA-3034

15-RC-3556

United Steelworkers of America, AFL-CIO

On October 12, 1967, Trial Examiner William Seagle issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also recommended that the election in Case No. 15-RC-3556 be set aside. Thereafter, the Respondent filed exceptions to his Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no preju-

dicial error was committed.[1] The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Standard Forge and Axle Company, Inc., Montgomery, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended

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[1] In view of the fact that the Trial Examiner granted leave to the Respondent to renew its motion for a continuance at the close of the General Counsel's case if Respondent still thought it had not had an adequate opportunity to prepare for the hearing, and the fact that Respondent failed to renew such motion, we find no merit in Respondent's present contentions that the Trial Examiner's original denial of such motion deprived Respondent of due process and a full and fair hearing.

[2] The Respondent excepts to the Trial Examiner's credibility findings. Under the established policy not to overrule a Trial Examiner's credibility findings unless a clear preponderance of all the relevant evidence convinces us that they were incorrect, we find no basis for disturbing the credibility findings made by the Trial Examiner in this case. *Standard Dry Wall Products, Inc.*, 91 NLRB 844, enfd. 188 F. 2d 362 (C.A. 3).

In adopting the Trial Examiner's findings of Section 8(a)(3) violations, we also rely on Respondent's widespread violations of Section 8(a)(1).

[3] Member Zagoria does not, however, rely on the letter of February 9, 1967, the circular, or the booklet, as bases for finding violations of Section 8(a)(1) or for setting aside the election.

orders that the Respondent, Standard Forge and Axle Order, as herein modified.[4]

Dated, Washington, D. C. MAR 27, 1968

(Signed) JOHN H. FANNING
John H. Fanning
Member

(Signed) HOWARD JENKINS, JR.
Howard Jenkins, Jr.
Member

(Signed) SAM ZAGORIA
Sam Zagoria,
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[4]In The Remedy section, the Trial Examiner stated that, in view of the serious nature of the unfair labor practices, he would recommend a broad form of cease-and-desist order, restraining Respondent from infringing upon any of the rights guaranteed to employees by Section 7 of the Act. We correct his apparent inadvertence in not doing so by deleting "like or related," and substituting therefor "other," in Section 1(c) of his Recommended Order, and in the corresponding seventh substantive paragraph of the Appendix.

TXD-565-67
Montgomery, Ala.

TRIAL EXAMINER'S DECISION

United States of America before the
National Labor Relations Board
Division of Trial Examiners
Washington, D.C.

Standard Forge and Axle Company, Inc.
Cases 15-CA-2968,
and 15-CA-3034, and
15-RC-3556
United Steelworkers of America, AFL-CIO

J. Thomas McGrath, Esq.,
of New Orleans, Louisiana,
for the General Counsel.
John C. Bachelle, Jr. and
C. Lash Harrison, Esqs.,
of the law firm of *Fisher*
and Phillips, of Atlanta,
Georgia, for the Respondent.
George C. Longshore, Esq.,
of the law firm of *Cooper,*
Mitch and Crawford, of
Birmingham, Alabama, for
the Charging Party.

Statement of the Case

Pursuant to a Decision and Direction of Election is-

sued on January 24, 1967, by the Regional Director for Region [illegible] of the National Labor Relations Board, an election was conducted on February 23, 1967, among certain employees of Standard Forge and Axle Company, Inc. (hereinafter referred to as Standard Forge) at its Montgomery, Alabama plant in order to determine whether they desired to be represented for the purposes of collective bargaining by the United Steelworkers of America, AFL-CIO (hereinafter referred to as the Steelworkers or simply as the union). Of the approximately 302 voters who were eligible to participate in the election, 103 cast valid ballots in favor of the union, and 187 cast valid ballots against it; the ballots of 9 voters were challenged, but the challenged ballots were insufficient in number to affect the result of the election.

On March 1, 1967, the union filed 10 objections to the conduct of the election, the objections being numbered alphabetically from A to J, and under date of May 12, 1967, the Regional Director filed his supplemental decision and report on the union's objections to the election, overruling objections A, C, G, I, and J, sustaining objection E, and recommending that objections B, D, F, and H be set down for hearing. In view of his finding with respect to objection E, the Regional Director also directed that the election of February 23, 1967, be set aside and that a second election be conducted. Upon the request of the employer for review of the Regional Director's decision, the Board, on June 14, 1967, entered an order granting the request for review, and directing that a hearing be held with respect to the issues raised by objections

B, D, E, F, and H; and authorizing the Regional Director to consolidate the proceeding with Cases 15-CA-2963 and 3034. The charge in Case 15-CA-2963 had been filed by the union on November 23, 1966, the charge in Case 15-CA-3034 had been filed by the union on March 1, 1967, and, pursuant to the Board's direction, the Regional Director, on May 16, 1967, issued an order consolidating the cases, and issued a complaint in the consolidated cases.

The issues in the complaint case are whether the respondent committed various acts of interference, restraint, and coercion in the course of its campaign against the union, and discharged three of its employees, William E. Cannon, Clarence Robert Litaker, and Roy A. Marston.[1]

Having been duly designated as the Trial Examiner, I, William Seagle, held a hearing with respect to the issues in the consolidated proceeding at Montgomery, Alabama, on July 18, 19, and 20, 1967.[2]

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[1] Marston's surname appears erroneously in the transcript as "Morriston." Monroe Clakeley, the supervisor of the respondent's shipping department also appears in the transcript as "Marvin Clakeley." Upon motion of the General Counsel, these errors are hereby corrected. Counsel of the General Counsel also moves that the record be corrected to reflect that respondent's Exhibit 2 was rejected. Actually, this exhibit was admitted but only as part of the respondent's offer of proof in connection with its motion for an adjournment of the hearing.

[2] At the hearing, counsel for the respondent moved for an adjournment on the ground that after they had interviewed employees in preparation for trial they had learned from one of the interviewed employees that the General Counsel had told one of the latter that he had been interviewed in an illegal manner. The motion was denied on the grounds that it should have been

Upon the evidence adduced at the hearing, the post-hearing briefs filed by counsel for the General Counsel, the respondent, and the charging party, and in view of my observation of the demeanor of the witnesses, I hereby make the following findings of fact:

I. The Respondent

The respondent, Standard Forge, is an Alabama corporation, which maintains its principal office and place of business at Hunter Station, Montgomery, Alabama, where it is engaged in the production of truck axles and related parts.

During the past 12 months, which is a representative period, the respondent, in the course and conduct of its business operations, purchased goods and materials valued in excess of $50,000, and these goods and materials were shipped to it directly from points outside the State of Alabama.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO is a labor organization which has agreed to organize the

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made to the Regional Director prior to the hearing and that to grant the motion would hinder the General Counsel in investigating the conduct of attorneys claimed to have been illegal. However, although leave was also granted to renew the motion at the close of the General Counsel's case if counsel for the respondent still thought that they had not had an adequate opportunity to prepare for trial, no such motion was made.

production and maintenance employees of the respondent.[3]

III. The Unfair Labor Practices

A. *Acts of Interference, Restraint, and Coercion*

1. The union's organizing campaign

In early September 1966, one of the employees of Standard Forge, whose name is William E. Cannon and who worked as a drill press operator, contacted Jimmie Lee Williams, a staff representative of the Steelworkers, with a view to interesting the latter in organizing the Standard Forge employees. Williams was on his way to a convention of the Steelworkers at Atlantic City, however, and nothing was done until after he had returned in the latter part of September when Cannon and some other employees commenced the solicitation of signatures to union authorization cards. Union meetings also began to be held in the middle of October at the union hall. The meetings were held at first on Tuesdays, and later on Thursdays, except for one meeting, which was held on Sunday, December 18, 1966. At the first union meeting, Cannon was selected as chairman of the organ-

[3] In his Decision and Direction of Election the Regional Director found the appropriate unit to consist of all production and maintenance employees at the Montgomery, Alabama, plant of the respondent, including the local truck driver inspectors and plant clericals but excluding office clerical employees, professional employees, over-the-road truckdrivers, guards and supervisors as defined in the Act.

izational drive, and two of the other Standard Forge employees, whose names are Clarence Robert Litaker and Roy A. Marston, were selected as assistant chairmen.

The union notified the respondent on November 7, 1966, that it could make a showing of interest in the plant, and on November 23 wrote a letter to the respondent requesting recognition. Since this request was declined, the union filed a representation petition on December 5, 1966, and the Direction of Election issued on January 24, 1967, scheduling the election of February 23, 1967, as already related.

2. The respondent's covert antiunion campaign

(a) *The interrogations and threats*

Shortly after the respondent's managerial hierarchy became aware of the union's efforts to organize the Standard Forge employees, it took measures to frustrate them. The top echelon of this managerial hierarchy consisted of John G. Hagen, who was president of the company; of H. R. Silver, who was general manager; and of W. R. McBride, who was the plant superintendent. The lower echelon of the hierarchy consisted of the foremen or leadmen in the five departments of the plant. The assembly department, which had three assembly lines, had three foremen, Lloyd Melvin Cagle, Conrad E. Cook, and Gladney O. Whitmire. The forge shop foreman was John Thomas Age;[4] the foreman of the machine shop was Fra-

[4]There was also a leadman on the night shift in the forge shop whose name was Willis A. Shumaker.

zier Paul; the foreman of the tool-and-die room was John R. Morris; and what was variously known as the yard or the shipping department had two leadmen, of whom only one, Monroe Clakeley, played any role at all in the respondent's antiunion campaign.

This campaign had two aspects: one covert and the other overt. The covert campaign was conducted almost entirely by the lower echelon of the respondent's managerial hierarchy, who received permission to talk to such of the employees as they wished to approach.[5] The most important and persistent of the foremen who interrogated the employees were Age, the foreman of the forge shop, who, alone had 72 employees, "colored and white," as he put it, working under him, and Cagle, one of the assembly department foremen. Age interrogated no less than seven of the employees concerning their union sympathies or activities, and he interrogated two of these seven employees twice, making a total of nine interrogations. Cagle interrogated similarly four other of the employees,[6] and McBride, Paul, Morris, Whitmire, and Cook each interrogated an employee. Age interrogated Willie Joe Rhodes twice, once a little

[5] I base this finding not only on the circumstances surrounding the interrogations of the employees but also on the following testimony of Shumaker, who was called as a witness by the respondent:

> Q. Did any of your superiors suggest that you have these conversations with your employees?
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> A. I was told that I was free to talk to them if I seen fit to talk to them.

[6] Two of the four interrogated employees were Litaker and Cannon but the interrogations of the discriminatees are discussed *infra*, in connection with their discharges.

before Thanksgiving 1966, and again a little after Thanksgiving; Joseph McQueen, Jr., once a little after Christmas 1966; Willie Wilson, Jr., once on or about January 23, 1967; Charles Edwards Mays, Sr., twice, once about a week before the election, and again 2 weeks before the election; C. W. Beaty, once about a week before the election; Lester Jurmon, once during the week before the election; and Collin Underwood, once about 2 weeks before Christmas 1966. Cagle interrogated Herschell Weldon about 3 weeks after the start of the union campaign, and Cagle also participated in a triple interrogation of Jessie O'Dell Pierce by himself, Whitmire, and Cook on or about November 5. Shumaker interrogated Eddie Lee Barlow a day or two before the election; Paul interrogated Kinnard Gillespie on or about December 15, 1966; and, finally, McBride interrogated Ervin Missildine on or about November 10, 1966.

It would be unduly repetitious to set forth in detail the precise circumstances and the dialogue in the case of each of the interrogations, for the interrogators seem to have followed as a rule a set pattern. Except in a single instance, the supervisor interrogating an employee would approach the latter at his work station,[7] and the opening gambit of the supervisor would be to ask the employee what he thought about

[7] The exception is Willie Wilson who was summoned to Age's office by another employee known as Preacher Robertson who told Willie that his boss wanted to see him in his office. Willie was then on his way to lunch out, fortifying himself with a drink, proceeded to Age's office.

the union. Almost invariably the reply of the interrogated employee to this question was evasive.

For example, Willie Joe Rhodes told Morris and Age that he had not yet "rendered a decision"; Joseph McQueen, Jr., told Age that he was undecided; Charles Edwards Mays, Sr., when interrogated by Age the first time told the latter that he had not given the union any thought and when interrogated by Age the second time told the latter that he would probably vote against the union; W. C. Beaty told Age that he did not know what to think, and asked for enlightenment; Lester Jurmon when questioned by Age, countered with: "Who told you I wanted a union?" and Kinnard Gillespie, although he confessed that he had signed a union card, declared that he had not made up his mind as to how he would vote.

In a few of the conversations between supervisor and employee, to be sure, the interchange did not go much beyond argument on the merits or demerits of unionism but such arguments were not between equals, and the employees were clearly on the defensive; they were, moreover, specifically advised to vote against the union. Examples of such conversations are perhaps those between Age and Joseph McQueen and Charles Edwards Mays, Sr., and between Shumaker and Eddie Lee Barlow, and perhaps the most significant were the conversations between Age and Mays. In the first conversation, Mays agreed with Age that the union was no good, just to get Age "off his back," as he put it, but in the second conversation, which was evidently a followup to the first,

May's told Age that although he had not made up his mind, he would probably vote against the union. During some of the interrogations, moreover, the interrogated employee was not only urged to vote against the union but was specifically asked whether he had been attending union meetings or had signed a union card. For example, Age asked Willie Joe Rhodes and Lester Jurnon whether they had attended union meetings, and in the case of Rhodes demanded to know why he had not been told that Rhodes was attending union meetings, which was clearly a reprimand.[8] An example of an employee who was asked whether he had signed a union card is Mashburn, who was asked this question by McBride himself.

Furthermore, a considerable number of the interrogated employees, despite the boldness or more circuitous, had their positions [illegible] directly threatened during the interrogation. During his second interrogation, Rhodes was told by Age that if the union came in the yearly raises, the Christmas bonus, and step promotions would be eliminated, and Age suggested to Rhodes that the employees talk to McBride. In his interrogation of Beaty, Age intimated that he had been able to keep the employees working because the company was nonunion and, in his inter-

[8] Counsel for the respondent attack the testimony of Rhodes on the ground that he said nothing in his prehearing affidavit about attendance at union meetings as well as nothing about talking to McBride in order to get more than the union could offer them. But such omissions do not in themselves establish a positive inconsistency. What a prospective witness will tell a prehearing investigator will often depend upon how searching the questions of the investigator are.

rogation of Underwood, Age was quite explicit in his threats, telling Underwood: "You are having it pretty good now but when the union gets here you are not going to have it good. If I were you, I would rule it out." By way of illustration, Age mentioned to Underwood that the employees would not be allowed to remain in the men's room for long times or otherwise engage in loafing. In his interrogation of Herschell Weldon, Cagle pointedly reminded the latter that he was the newest man on the job, and in his interrogation of Gillespie, Paul told the latter that McBride had declared that "they would close the shop down before they would operate under a union."[9]

The multiple interrogation of Jessie O'Dell Pierce by Cagle, Whitmire, and Cook on the same day at 15 minute intervals is perhaps the best illustration of the threatening character of the interrogations conducted by the respondent's supervisors. In Pierce they found one of the more candid employees who admitted that he was for the union and that he had signed a union card and the three supervisors threatened either that the plant would close, or that Pierce himself would be fired. Pierce's testimony concerning his conversation with Cook is particularly worth quoting. It was as follows:

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[9] Again this item of testimony is attacked by counsel for the respondent on the ground that it is not contained in Gillespie's prehearing affidavit. But in this instance the item is contained in a supplemental affidavit given by Gillespie shortly after the original affidavit.

> Yes, sir, I won't ever forget the way he approached me. He came up to me and said, "Jess, was your cars burning last night?" And I said, "No, I don't guess; what?" He said, "Me and my wife was talking about you." I said, "You was?" He said, "Yes, I told her that you had been misled and had signed a Union card." I said, "Yes, I did, Cook." He said, "Well, that's the wrong thing to do." I said, "It might be, Cook, but I signed a card and I am going to vote for the union." He said, "Well, Jess, I think a lot of you and I hate to see you lose your job with the size family you have got."
>
> I do have a large family. Anyway, he went on to say that I would lose my job and they would not operate the plant under the union.

The impact of such interrogations of the employees was not materially lessened by virtue of the fact that in the case of the interrogation of one employee, Willie Wilson, Age gave him what seemed to amount to an assurance against reprisals by telling him that if he told the truth about his stand with respect to the union neither their relationship nor his job would be affected. How effective even the mildest interrogations are in disturbing the peace of mind of employees is illustrated by the case of Missildine who did not wait to be interrogated but sought out McBride of his own accord as soon as he heard that McBride was under the impression that Missildine was "pushing the union." On or about November 19 Missildine, who had

actually signed a union card, went to assure McBride that his signing of the union card did not necessarily mean that he would vote for the union.

As is usually the case, the versions of the interrogations given by the respondent's witnesses do not agree with those given by the General Counsel's witnesses but where they differ I credit the testimony of the latter, with a very minor exception.[10] The only one of the respondent's supervisors who almost told "nothing but the truth" was Shumaker who admitted taking the initiative in talking to Barlow about the union. Indeed, Shumaker admitted to talking to other employees in the same vein as to Barlow. Another supervisor who also admitted taking the initiative in talking to Gillespie about the union was Paul but, although he denied some aspects of Gillespie's testimony, the interchange to which he admitted clearly constituted an unfair labor practice, for he testified as follows:

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[10]This is the testimony of C. W. Beaty, one of the Negro hands, that in his conversation with Age on or about February 15, 1966, the latter told him that the company from which Standard Forge bought its steel had already informed the latter that it would have to cut production if Standard Forge went union. This testimony was, of course, absurd but I do not believe that Beaty was fabricating when he gave it. He was merely giving his own garbled version of what the company had told the employees in a letter dated February 9, 1967, which forms the basis of the union's objection E. This letter is fully discussed *infra*, but the point of the letter was that Standard Forge had been informed by some of its customers that it would not continue to be their sole source of supply for axles if it were unionized.

All right. I said to Mr. Gillespie, "Are you satisfied and happy with your job," and he said, "Yes." I said, "Well, I have heard rumors that you were taking part in the Union and were not happy with your job. I feel like that if you are not happy, I would like to know it and *would like to work it out with you.*" Mr. Gillespie stated to me at that time that he had signed a Union card but he did not know whether he would go along with the Union or not. That was about the extent of the conversation [Emphasis supplied].

As for the other supervisors of the respondent, they admitted that they talked to the interrogated employees about the union but according to them, these employees were always the ones who initiated the conversation by asking the supervisors what they thought about the union and volunteering some such item of information as that they had signed a union card. To the effect that they did discuss the union with the employees, it seems that they did no more than to express their honest opinions. "We differed on opinions," declared Clakeley sadly and sententiously. In other words, while they admitted having conversations, it always turned out somehow that they never said anything that could be construed as coercive, or that went beyond the permissible bounds of a supervisor's curiosity. The technique is exemplified best perhaps in the testimony of Age, the most frequent offender, who added to the general technique a readiness to explain anything that seemed suspicious. He admitted, for example, that he had asked Preacher Robinson to tell Will

Wilson to come to his office but explained that it was to ask the latter to do a job 10 minutes before lunch time, and that the conversation that they had about the union was more or less incidental. But Age also explained that he wanted to talk to Wilson in his office because of "the extreme racket in the forge shop." He had had no difficulty, however, in talking about the union to any of the other employees under him in the forge shop, who were at least six in number, while they were at their work stations, despite the supposed racket in the forge shop.

That Age in particular meant business in initiating conversations about the union with the employees under him is indicated by his attempt to explain his denial that he had talked to Mays about the union. It seems that the explanation was that he could not have talked to Mays about the union because he knew that Mays was not even eligible to vote in the election. In other words, there was no point in wasting his valuable time in attempting to persuade a nonvoter.

I find it impossible to believe that the respondent's supervisors were merely engaged in conducting Socratic dialogues with the untutored factory hands under them and that these were always seeking them out, moreover, and making them their confidants about their union activities. The testimony of the respondent's supervisors is particularly incredible in view of the fact that the respondent's management was bombarding its employees at this time with a series of letters setting forth its unfavorable views about the union, as hereinafter related.

I must conclude that the interrogations were coercive, except possibly in one or two instances, and interfered with the Section 7 rights of the employees. In a considerable number of the interrogations, threats were made of the loss of jobs or privileges, and in other or the same interrogations, questions were asked concerning attendance at union meetings. It was also an unfair labor practice for some of the respondent's supervisors to suggest to the employees after the union campaign had started that they contact McBride with a view to the removal of some of their grievances. As there was an election pending, there was also no justification for questioning any of the employees as to whether they had signed union cards, or as to how they intended to vote in the scheduled election. The Board has often held that such conduct tends to undermine the very purpose of a Board-conducted election, which is to afford employees the opportunity to express themselves by secret ballot."[1]

(b) *The surveillance of the union meeting of December 18, 1966*

In addition to his interrogation of Gillespie, Paul is charged with the surveillance of the union meeting which was held at the union hall in Pratville, Alabama, the afternoon of Sunday, December 18, and which was attended by 20 to 25 of the Standard Forge employees

[1] See, for instance, *Ballas Egg Products, Inc.*, 121 NLRB 873; footnote 1; *Lincoln Bearing Company*, 133 NLRB 1069, 1070; *Marsh Supermarkets, Inc.*, 140 NLRB 899, 901, *Clark Printing Company, Inc.*, 146 NLRB 121, 122

Pratville, which is a town located between 5 and 7 miles from the Standard Forge plant, has a business district which consists of a street that is only two blocks long. The union hall is located on this street, and alongside of the union hall is a building that houses the offices of the Pratville Progress, a local newspaper. While the union meeting was going on, some of the employees in attendance saw Paul and one of the employees, who worked under him in the machine shop and whose name was Clarence E. Jenkins, sitting in a car parked before the offices of the Pratville Progress. Paul and Jenkins remained there while the union meeting was going on for a period of at least half an hour, and perhaps as much as three-quarters of an hour.[12]

The respondent contends that Paul and Jenkins were parked at the Pratville Progress on a legitimate errand, and that they had not gone there to engage in the surveillance of the union meeting which was in progress. Paul and Jenkins both testified — and their testimony is in close agreement in this respect — that they went to the Pratville Progress to talk to one Richard Bond, who worked there, and who had given Jenkins a bad check for $90 in payment of his October rent. Paul was evidently very friendly with Jenkins, and his interest in the bad check also stemmed from the fact that when the check had bounced he had loaned $100 to Jenkins. I accept the testimony of Paul and

[12]Paul himself testified that he and Jenkins were there for three-quarters of an hour.

Jenkins, insofar as it explains their presence near the union hall, but this does not necessarily exculpate them from the charge of surveillance. If, despite the legitimacy of their original errand, they lingered on the scene for the purpose of spying on the employees who were attending the union meeting, they were engaged in surveillance. Paul and Jenkins attempted to justify their lingering on the scene as necessary to the consummation of their errand, but I am unable to summon up the requisite degree of naivete to credit this part of their story. This story was that, when they arrived at the Pratville Progress and Jenkins tried the front door of the shop, which he found to be locked, they decided to go back to their car and wait because they had heard noises inside the Pratville Progress and believed that someone must be there. If this were really true, it is difficult, if not impossible, to understand why Jenkins did not try to rouse someone immediately, and was content to wait at least a half hour before he tried again. If they waited, it could only have been because they wished to keep the union hall under observation. I have little doubt, indeed, that they did so. Both Paul and Jenkins were obviously interested in the union's activities, as was indeed the whole of the Standard Forge management, and they would hardly have neglected such a golden opportunity to learn who was attending union meetings. Not only is Paul known to have engaged in the interrogation of at least one employee, but Jenkins was very active in a committee of antiunion employees known as "The Committee for the Employees Who Do Not Want a Union" or as "The Committee Who Represents the Employees Who Do Not Want a Union." There can be

no doubt at all that Jenkins at least knew that there was a union meeting in progress while he and Paul were sitting in the car, for Jenkins himself testified that he had been invited to the December 18 meeting, and that he saw four or five of the Standard Forge employees going into the building that housed the union hall. There can also be no doubt that Jenkins would hardly have failed to comment to Paul on these developments while the two of them were sitting in the car. Paul's own testimony that he knew nothing about the antiunion committee and Jenkins' role in the committee, and that they did not talk about the union that day hardly enhances his credibility as a witness. This testimony of Paul is not only inherently incredible but directly in conflict with the testimony of Jenkins who proved a far more candid witness, although the candor may have been somewhat involuntary. Jenkins testified that *everyone* knew that he was against the union, and of course everyone would include Paul.

Moreover, Jenkins admitted that he would talk to Paul about the union, and that Paul knew that he was against the union. In the end Paul himself really admitted that he knew that there was a union meeting in progress that day, for when he was asked whether it was not true that someone had taken the license plate number of his car, while he was parked before the Pratville Progress, he not only admitted that he saw the person who took his license plate number passing three cars below him but that he remarked to this person that "if he would come by I would autograph it for him." This piece of irony would not be understandable except in the context of the union

situation and the union meeting. Furthermore, there is the testimony of Roy A. Marston, one of the Standard Forge employees, who had been discharged the previous day,[13] that he saw Paul and Jenkins parked in the car before the Pratville Progress, that he waved to them, and that they both waved back to him. I accept this testimony, and it established conclusively that Paul and Jenkins knew that there was a union meeting in progress. I conclude that Paul and Jenkins lingered on the scene in order to keep the union meeting under surveillance, and thus violated Section 8(a)(1) of the Act.

2. The respondent's overt antiunion campaign and the issue in the representation proceeding

The respondent's overt antiunion campaign was waged by means of a series of letters and a circular sent to its employees. There were five such letters, each dated, respectively, December 8, 1966, and January 12 and February 2, 9, and 20, 1967. Each of these letters, except the letter of February 9, 1967, was signed by H. R. Silver, the respondent's general manager, and made known to its employees the respondent's opposition to the unionization of its employees. The union's objection to the election based on these letters was overruled by the Regional Director, and the propriety of these letters is no longer an issue in the representation proceeding.

The letter of February 9, 1967, which was signed by J. A. Rumbley, the respondent's sales manager, rather

[13] This discharge is discussed infra.

than by H. R. Silver, its general manager, forms, however, the basis of the union's objection E to the conduct of the election, and, although the objection was sustained by the Regional Director on the authority of *Haynes Stellite Company, Division of Union Carbide Corporation*, 136 NLRB 95, it was included in the issues to be heard in the present consolidated proceeding. This was done, apparently, so that the impact of the letter could be considered in the context of the whole of the respondent's conduct.

The theme of the letter of February 9 is the effect which the unionization of Standard Forge would have on the sales of the company, and Rumbley stressed the fact that he had been its sales manager for about 20 years, and was thus, presumably, in a good position to advise them. The key paragraph of the letter of February 9, is its third paragraph, which was as follows:

> Customers buy products on the basis of prices, delivery and dependability. The *facts* are that in some cases we are the sole source of supply for many of our customers. Our sales to customers who are buying all of their axles from us amounts to more than 70% of our total volume of sales. We have been told by *many* of these customers that we would not continue to be the sole source of supply if we became unionized, because of the ever present possibility of a work stoppage due to strikes or walkouts [Emphasis supplied].

It is apparent that the respondent's sales manager purported to speak to the employees not in the language of prediction but of hard facts. His own testimony establishes that he was not purveying facts but misstating them and, therefore, misleading the employees. In fact, 70 percent of the respondent's customers, who were, supposedly, buying *all* of their axles from the respondent, did so only *normally*, a word not found in Rumbley's letter. Actually, these supposedly exclusive customers from time to time purchased axles from competitors of Standard Forge. Although Rumbley also asserted that he had been told by *many* of these customers that Standard Forge would cease to be their sole source of supply if the company became unionized, he revealed as a witness that he had been told that by only *three* of the respondent's customers,[14] and then only after he had informed them of the pendency of the election. Moreover, not one of these three customers threatened to drop Standard Forge altogether if the respondent became unionized.

The situation in the instant case, so far as the Rumbley letter is concerned, is not really distinguishable from that in *Haynes Stellite* in which the employer's representatives had told the employees in a prepared speech: "Customers are buying products on the basis of prices, delivery, and dependability. The facts are that in some cases we are the sole source of sup-

[14]These three customers were Dorsey Trailers of Elba, Alabama; Great Dane Trailer of Savannah, Georgia; and Trialco Manufacturing and Sales Company of Hummells Wharf, Pennsylvania [the name of this Pennsylvania town is mispelled in the transcript as "Hummelswherf," and it is hereby corrected].

ply at present for some of our customers. *We have been told that we would not continue to be the sole source of supply if we become unionized*; due to the ever present possibility of a work stoppage due to strikes or walkouts." This language is so close to that in Rumbley's letter that it may well have served as a model for Rumbley's composition. The Board, in holding the language used in *Haynes Stellite* to constitute a violation of Section 8(a) (1) of the Act, declared:

> The statements involved herein indicate that a loss of orders, and hence of jobs, would result merely by virtue of the employees' designation of the Union, and were accompanied by constant references to the probability of strikes if the Union won the election. Further, we find, contrary to the Trial Examiner, that the Respondent materially misrepresented the facts when it stated that "some of [its] customers" would seek other sources of supply, whereas only one customer had so informed the Respondent. It is also highly significant that the Respondent failed to name the customers involved or supply any other information.

I am willing to concede the contention of counsel for the respondent that the Board did not hold, or intend to hold, that the language in *Haynes Stellite* was *per se* a violation of Section 8(a) (1) of the Act. But this concession does not help them any, for the record shows that Rumbley's letter of February 9 was issued in the context of many other unfair labor practices,

including not only those already described but also the discharge of at least one of the leaders of the union movement, as hereinafter related. These unfair labor practices only underlined the threat clearly contained in Rumbley's letter that unionization would lead to loss of employment. In view of this threat, I also see no point in the contention of counsel for the respondent that Rumbley's letter must be held to be harmless because the union had 2 weeks before the election in which to reply to it. Such a reply could have done nothing to remove the fear engendered by the threat contained in the letter.[15]

I am aware that the Sixth Circuit denied enforcement to the Board's order in *Union Carbide Corporation v. N.L.R.B.*, 310 F.2d 844. But the basis of the court's decision seems to have been, as the court stated, that the violation found in *Haynes Stellite* "was the only violation found by the Board in the entire election campaign which was vigorously conducted by both sides." In the present case, the violations are both multiple and serious. In any event, the Board has not abandoned its position in *Haynes Stellite*,[16] and I am bound, of course, by the Board's decision. It is not necessary to find, moreover, that Rumbley's letter constituted an unfair labor practice, so far as setting

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[15] It has been so held, for instance, in *Oak Manufacturing Company*, 141 NLRB 1323, 1324, and *The Lord Baltimore Press*, 142 NLRB 328, 329. The cases cited by counsel for the respondent *Motec Industries, Inc.*, 136 NLRB 711, and *Trent Tube Company*, 147 NLRB 538, seem to me to be inapposite.

[16] See *S. N. C. Manufacturing Co.*, 147 NLRB 809, 819; *The William J. Burns International Detective Agency, Inc.*, 148 NLRB 1267, 1287; *Caldwell Mfg. Co., Inc.*, 149 NLRB 112, 115.

aside the election is concerned. It suffices that it constituted an unfair election tactic.[17]

In addition to the letters sent to its employees, the respondent distributed to them a lurid circular which was printed on a sheet measuring 22 x 17 inches but folded in four parts.[18] When folded, the title was revealed, and this was "An Important Message For You." The title was printed in black and white letters on a red background, and the same color scheme was employed throughout the circular, which purported to reproduce newspaper stories about futile strikes and violence during strikes. The stories were illustrated by photographs of damaged automobiles, and a nurse adjusting a pillow for a "human torch." The circular also had imprinted upon it starbursts of white letters on red backgrounds reading: "Innocent People Suffer-Most," "No Value On Human Lives," "Weeks Without Pay," "Investigation," "Double Cross," and "Thousands Idled". In a box in the upper right-hand corner of the circular, the moral of the newspaper stories was summed up in bold black and white letters on a red background as follows:

> This is NOT the way people at Standard Forge Do Business.

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[17] See, for instance, *Aeronca Manufacturing Corporation*, 118 NLRB 461, 466—467

[18] This circular forms the basis of the union's objection F.

Who wants violence, strikes, loss of income and uncertain future?

VOTE *NO* FEB. 23

The respondent also distributed to its employees a booklet entitled "What the Union Can Do For You." When opened the pages of the booklet were discovered to be blank.[19]

Taken together, Rumbley's letter, the circular, and the booklet were intended to convey to the employees the message that unionization would not only be futile but could only lead to strikes, loss of income, and violence. The Board has repeatedly held that propaganda stressing the futility of union organization with consequent strikes and loss of employment violated Section 8(a)(1) of the Act, and formed a basis for setting aside an election.[20]

The respondent engaged, however, not only in war of words with the union but indulged also in the propaganda of the deed. Its deeds were the unfair labor

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[19]This booklet forms the basis of the union's objection II.

[20]See *The Trane Co.*, 137 NLRB 1506, 1510; *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1785; *Texas Industries, Inc., etc.*, 139 NLRB 365, 368; *The Little Rock Downtowner, Inc.*, 143 NLRB 887, 890; *Ideal Baking Company of Tennessee, Inc.*, 143 NLRB 546, 547; *General Industries Electronics Company*, 146 NLRB 1139, 1140—41; *Federal Envelope Company, etc.*, 147 NLRB 1030, 1080; *Herman Wilson Lumber Company*, 149 NLRB 673, 679.

practices which are described in this decision.[21] To the extent that they were committed between the date of the filing of the union's representation petition and the date of the election, they also form the basis for setting it aside.[22] The record shows that eight of the interrogations and two of the three discriminatory discharges occurred after the filing of the petition on December 5, 1966. These represented serious unfair labor practices that form an additional basis for setting aside the election of February 23, 1967, and for affirming the Regional Director's direction of a second election, which I shall recommend.

B. *The Discriminatory Discharges*

1. McBride's disciplinary system

An unusual aspect of the operation of the Standard Forge plant was that none of the foremen had authority to hire or discharge any of the employees who worked under him. The power to hire or to discharge an employee was vested solely in the plant superintendent, McBride, who had commenced his career at Standard Forge in 1940 and who had retired in the spring of 1967.

McBride had a system of administering discipline that was all his own. When an employee did something to displease McBride, the superintendent would pull

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[21] These unfair labor practices form the basis of the Union's objections B and D.

[22] See *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275, 1278.

his timecard from the rack. When the unfortunate employee came to work the next day, he would note that his timecard was not in the rack, and, he would hie himself to McBride for an explanation. McBride would tell him why he had pulled his timecard, and tell him to "take off a couple of days." When the errant employee reported to McBride again, the superintendent would talk to him in order to determine whether he now had "the right attitude." If McBride was convinced that his attitude had changed for the better, he would put the errant employee back to work. If McBride was not convinced that the errant employee had truly reported, he would tell him to come back in a few more days. The record shows that eventually virtually every errant but repentant employee who kept coming back was restored to the payroll. As a result of this system, McBride boasted, "we have men out there who have been there for twenty or twenty-five years. We did not fire men just for the fun of it." Indeed, McBride explicitly testified: "I don't recall a case where they reported back and had the right attitude, had been on the job so long, that I did not put [sic] back, whether I sent him back two or three times. Eventually, I would put them back. I don't recall a case that I haven't done it." McBride also testified that he could not recall a case where the development of the right attitude had taken more than 2 weeks at most.

So far as specific cases are concerned, McBride recalled the case of one employee, whose name was Dave Sexton, whose timecard he had pulled 27 times in 27 years. McBride also recalled the cases of two

other employees named Watts and Sorrells whose timecards he had pulled in 1965 or 1966 but who were not restored to the payroll. It seems that Watts' offense was that he started out to work one morning but turned back when it began to rain, despite the fact that he had another employee with him who was dependent on him for transportation. It seems that when McBride talked to Watts, the latter took "a no care attitude." It is not clear, however, whether Watts ever came back to talk to McBride again. As for Sorrells, his offense was even more serious. He reported for work one morning although he was drunk; he punched his timecard and disappeared; and late in the day, after everyone had left he sneaked back into the plant, and punched his timecard out as if he had worked all day. Yet McBride did not fire him instanter! As usual, he just pulled Sorrells' card, and when the latter apologized and promised "he would never do it again," he was put back to work. But a month or two later Sorrells failed to report for work during a whole week, and made no effort to notify anybody, and McBride finally fired him when he showed up with a phony doctor's certificate in an attempt to excuse his absence without leave.

Even counsel for the respondent characterize McBride's system as "a peculiar method of discipline" and also as "strange." It certainly had one serious drawback from the point of view of the Standard Forge employees who were subjected to it. The Standard Forge plant had no set of written rules, and the employees were, therefore, not put on notice in advance that certain conduct was prohibited. In this

respect. McBride was in the same position as the judges of the common law courts in the classical period of the common law. They purported only to declare what the common law was but they often made the law after the event. Jeremy Bentham, the apostle of legislation and codification, denounced this system "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me." Counsel for the respondent seem to admire McBride's system, for they seem to argue that in discharging Litaker, Cannon, and Marston, the three leading union proponents, he was doing no more than applying the McBride system, which he had been practicing for some 27 years, and they conclude that his decisions were, therefore, just and unreviewable. But actually there are restraints upon even the most absolute despots, as has long been recognized, and, while there was no set of written rules in effect at Standard Forge, there were well-recognized practices, just as there were well-recognized precedents in the common law, and it is against these practices that McBride's conduct must be judged.

The McBride system must also be judged, moreover, in the light of the result of the system which was to produce a high degree of stability in employment at the Standard Forge plant. McBride himself conceded that discharges of employees were uncommon at Standard Forge, for no matter how serious the offense of an employee may have been, there was always a *locus poenitentiae*. Yet in a period of less

than a month and a half towards the end of 1966, he pulled the timecards of no less than three employees on the flimsiest of pretexts and failed to restore them to the payroll, although at last two of them repeatedly applied for restoration to their employment. He never found them to have the right attitude, it seems. Moreover, in the case of two of these employees, Cannon and Marston, he departed from his usual practice by discharging them outright, as hereinafter related. It is hard indeed to believe that it was no more than a mere coincidence that the three employees of whom McBride rid himself also happened to be the three leaders of the union organizational campaign.

2. The employment records of the three discriminatees

The three employees to be discharged were, in the order in which they were discharged, Clarence Robert Litaker, who was discharged on November 5, 1966; William E. Cannon, who was discharged on December 15, 1966; and Roy A. Marston, who was discharged on December 17, 1966. The record shows that at least until the advent of the union they had been regarded as entirely satisfactory employees. Indeed they were in fact exceptionally valuable employees.

At the time of his discharge, Litaker had been with the respondent for about 13 months At the time of his discharge he was working on Cook's welding line, although on occasion, when he was caught up in his work, he also worked under Cagle. His skill as a welder is clearly indicated by the fact that although

he started to work at $1.50 an hour, he was raised to $1.80 an hour after only a week of employment. Within 4 months thereafter he was, moreover, up to $2.20 an hour, which was the top rate for welders other than maintenance welders. When he also did piecework, he never made less than $3 an hour. Indeed, Litaker was so good that McBride once told him that he was one of the best men he had ever hired. Moreover, after he had been discharged he obtained a better job in Edgewater, Florida, being employed there as an assistant foreman in charge of 10 to 15 employees.

At the time of his discharge, Cannon had been employed by Standard Forge for about 7-1/2 years, except for a period of 8 months in 1961 when he had been involved in a general layoff. As already mentioned, he was the only drill press operator in the assembly department and he had a combination hourly and piecework rate. When first employed, his rate had been $1.20 an hour but he received an increase of 10 cents an hour during each year of his employment. With the piecework, he was making at the time of his discharge from $2 to $2.25 an hour.

Marston had had two different periods of employment at Standard Forge. The duration of his first period of employment is not established but the second period of his employment lasted from 3 to 3-1/2 years, during which he worked in the assembly department under Whitmire, with whom he sometimes lunched. Marston's starting rate of pay was $1.50 an hour but he had received three general increases of 10 cents an hour, which brought his rate of pay up to $1.80 an hour.

3. The respondent's knowledge of the union activities of the discriminatees

There can be no doubt that the respondent's management had full knowledge of the union activities of the knowledge were both general and particular. The respondent's supervisors made it manifest in their interrogations of some of the employees that they knew who were attending union meetings or who had signed union cards.[23] In a plant in which the union and anti-union employees were, apparently, separately organized in groups, the union employees being opposed by the group known as "The Employees Who Do Not Want a Union," the side espoused by such prominent union adherents as Cannon, Litaker, and Marston could hardly remain a secret. It is also established that John R. Morris, the foreman of the tool-and-die room, had a son, Thomas, who attended the second union meeting, and who on occasion, during his father's absence, took his place as foreman. This second union meeting was opened by Marston. It is hardly necessary to note, however, such general sources of knowledge when the evidence shown in abundance particular sources of knowledge. The three discriminatees were also among the employees who were interrogated by their foremen.

Several weeks after the union drive started, Cagle came up to the assembly line on which Litaker was working, and remarked to the latter: "I am going to

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[23] These intimations amounted to the creation of an impression of surveillance, which is in itself an independent unfair labor practice, but I make no such finding, since such an unfair labor practice is not alleged in the complaint.

get your daddy to whip your ass" (it seems that the Cagles and the Litakers lived close together, and that Cagle was a friend of Litaker's father). Litaker asked "why," and Cagle countered with: "Did you sign a union card?" Litaker replied to this question in the affirmative, and informed Cagle that he was for organized labor. Cagle and Litaker had additional conversations during the month of October 1966, and these usually occurred on days when a union meeting was scheduled. In these conversations, Cagle would tell Litaker that he should not be going to the union meetings, that he was just cutting his own throat because he was making more money than he would if the plant were unionized. Litaker would repeat his stand in favor of organized labor.

On November 4, which was the day before his discharge, Litaker, early in the morning, was reading a newspaper which contained a story about a strike at the Dorsey Trailer Works. It is not entirely clear whether Litaker showed this story to Cagle, or Cagle noticed it himself but in any event Cagle remarked to Litaker: "It looks like Dorsey's boys got hungry and went back to work." Cagle went on to tell Litaker that he did not know "a damn thing" about unions other than what he read in the papers, that there was nothing in the unions but Communists and killings.

One afternoon, about the middle of October, Litaker also had an encounter with Cook. It was a Saturday when the employees would bring their radios in to hear the broadcast of a football game. As Litaker whose table was caught up, was listening to the

broadcast. Cook walked up to him and remarked: "You are not going to be able to sit on your behind like that if the union comes in here." Litaker told Cook that his table was caught up and that he would appreciate it if Cook would not talk to him like that. It is significant that Cook did not altogether deny Litaker's testimony. He recalled an occasion when the employees were listening to the broadcast of a ball game on their radios; and, there being work to be done, he remarked to them: "Boys, ya'll couldn't do this if you worked for anybody else except Standard Forge."

In the case of Cannon, the respondent's management knew from the very beginning that he was pushing the union for the simple reason that he told Cagle, his foreman, that he was for it 100 percent, and Cagle passed this on to McBride. Thus, as Cagle testified:

> Q. What knowledge did you have about Mr Cannon being involved in the Union Business?
>
> A. Well, *he told me he was.*
>
> Q. What did he tell you?
>
> A. He said that *he was one hundred per cent for it.*
>
> Q. When did he tell you that?
>
> A. *Right after it started.*
>
> * * * *
>
> Who did you tell with the company? *Did you tell Mr. McBride what Mr. Cannon had told you about being one hundred per cent for the company?*
>
> A. *Yes, sir.*

Q. Union, I mean.

A. Yes, sir [emphasis supplied].

Cagle and McBride did not regard their knowledge of Cannon's prounion sentiments, moreover, simply as interesting information. Cannon was a strong and assertive personality, and Cagle and McBride obviously feared the effect of his prounion activities. They had a particularly good reason for this fear because the nature of his job was such that he had a good deal of unoccupied time. Cannon was the only drill press operator in the assembly department — there were others in the machine shop — and in the performance of his job he drilled brake shoes. As there were different types of brake shoes, these had to be selected from the brake shoe shed before Cannon's work could proceed. It is crucial to understand that while in theory it was part of Cagle's job to select the brake shoes, in practice Cagle was not always available to do so, and then Cannon would go to the brake shed himself to select brake shoes. This would give him, of course, an opportunity to move about the plant. It also frequently happened that the desired type of brake shoe was not immediately available, and that Cannon, who worked on a combination of an hourly and piecework rate, had spare time on his hand between jobs that sometimes amounted to an hour or two or even more. The fear of Cagle and McBride was, of course, that Cannon would take advantage of his mobility, especially during his unoccupied time, to talk to the employees about the union, and Cagle began to shadow him as he moved about the plant. This shadowing must have been conducted, moreover,

in a manner that could hardly be described as unobstrusive, and Cannon was perfectly aware that Cagle was keeping him under surveillance. As Cannon was not the sort of person who would take this treatment without angry protest, clashes between him and Cagle occurred on a number of occasions.

Towards the end of October 1966, while Cannon was in the brake shoe shed, Cagle observed the latter talking to Willie Means, the company janitor. Cagle came up and asked Cannon what he was doing there. Cannon replied that he was looking for brake shoes but Cagle accused him of talking about the union and threatened to have him fired if he did not return to his work station. Cannon challenged Cagle to go ahead and have him fired if he could. About 2 weeks later Cagle again tagged Cannon about the union while the latter was in the brake shoe shed, accusing Cannon of turning against him, and calling him a crook for getting mixed up in the union mess. Cannon's rejoinder to this was: "If I am a crook, you are a crook for fighting against something that will help me." Cannon also told Cagle to "get out of there" and "to stay off his back," as well as to quit following him around like a puppy, and watching him all the time. Cagle did not deny these clashes but incredibly denied that they had anything to do with the union, or that he told Cannon to stop talking about the union, or called him a crook. Yet even Cagle admitted that Cannon complained that he had been "on his back" all the time, and that he had told Cannon that he had turned against him, despite his helping him in the past.

The job of keeping Cannon under surveillance and of preventing him from pushing the union was not delegated, moreover, entirely to Cagle. There were occasions when McBride himself took Cannon to task for the angry language which he used towards Cagle, and threatened to discharge Cannon if he did not stay on his job. Furthermore, McBride, to prevent Cannon from moving about or standing around idle, began to check in the evenings to see that Cannon would have enough material on hand to start work the following morning.

That Marston, whose nickname was "Yank," was engaged in passing out union authorization cards was also well known to the respondent's management. Marston kept these cards behind the sun visor of his automobile. He was in the habit of lunching with Whitmire and Clakeley, and sometimes the three of them would ride in Marston's car when they went to lunch. Anyone who looked up at the sun visor would see the union authorization cards. Moreover, one day the cards fell from the sun visor on to the seat, while Clakeley was riding with Marston When Clakeley picked the cards up, Marston said to him: "Monroe, this is just what we need" but Clakeley replied: "No, we don't need that." This sun visor incident was admitted by Clakeley, who testified that Marston even asked him to sign one of the cards, and that he refused to do so.

During the week before Thanksgiving, Marston also had a conversation with Morris, the foreman of the

tool-and-die room while he was there. The dialogue, as reported by Marston, was as follows:

> MORRIS: Yank, I hear you are fooling around with this union.
>
> MARSTON: Yes, I am.
>
> MORRIS: Well, instead of fooling around with that union, why didn't four or five of you get together and go and talk to Mr. McBride and Mr. Silver.
>
> MARSTON: Pappy [this apparently was Morris' nickname], there ain't no way that you can stop Mr. Mac long enough going to the shop, let alone trying to sit down and talk with him. I think I am doing what is right.

Morris did not exactly deny this conversation. He only claimed that Marston asked *him* how *he* felt about the union, and that he then suggested that he take the matter up with Superintendent McBride. It is impossible, however, to believe Morris' version of the conversation, since in attempting to give it, he also revealed that he had accused Marston of fooling around with the union! Thus, Morris testified:

> Q. Mr. Morris, did you initiate the conversation with Mr. Marston about the Union?
>
> A. That is about all we had to say about it.
>
> Q. No, sir, did you start off the conversation?

A. Oh, no, he started it.

Q. Did you say, "Yank, I hear you are fooling with the Union?"

A. Yes, *something like that, after it was all over with* [emphasis supplied]

According to Whitmire, his foreman, it seems, furthermore, that Marston, like Cannon, exhibited a proclivity for wandering about all over the plant, and disappearing when he was most wanted. But in the case of Marston, this, according to Whitmire, had been going on for something like a year, which would be long before the advent of the union. Whitmire also testified, moreover, that in the months of September, October, and November 1966, he had to look for Marston some seven or eight times, and that he had reported these disappearances to McBride. But, as is apparent, McBride took no action during these 3 months. Whitmire offered a bit of testimony that goes a long way towards explaining how indulgent McBride normally could be. When Whitmire was asked whether he was strict in enforcing work rules, he replied: "Not without a guy got away out. Under *normal* conditions of an average company, we have more liberties, I would say, than any place I have ever been" [emphasis supplied].

4. The pretexts for the discharges

(a) *In the case of Litaker*

On November 5, 1966, which was a Saturday, Litaker reported for work as usual at 7 a.m.; and, although he

was not feeling too well, he was planning to work all day. He worked until about 11:40 a.m. but by then he was feeling worse, and decided that he would tell Cook or Cagle that he would take off the remainder of the day. He made a round of the shop, but he was unable to find either Cook or Cagle, who often left early for lunch. Seeing Harvey DeLoach, one of the timekeepers, he told the latter of his intention to leave for the remainder of the day because he was sick, but that he would make one more round of the shop to see if he could locate Cook or Cagle. In the event that he was unable to do so, Litaker asked DeLoach to give them the message that he had had to leave. Litaker punched out at noon, and went over to the Plaza Cafe, a restaurant that was right across the street from the Standard Forge plant. At the Plaza Cafe, he had lunch with an acquaintance by the name of Doug Sanford with whom he often had lunch. After finishing his lunch about 12:35 p.m., Litaker went home, where he lay down on a couch and watched the L. S. U. — Alabama football game on T.V. during the remainder of the afternoon. He did not again leave the house that day. The reason for Litaker's indisposition was that he suffered from a peptic ulcer for which he was receiving medical treatment.

Litaker reported for work, as usual, on Monday morning, November 7, and found that his timecard had been removed from the rack. Consequently, he went in search of McBride, and when he found the superintendent asked the latter why his timecard had been pulled. McBride then told Litaker that he was going to have to let him go. After talking a bit further

to McBride, the latter told Litaker to check back with him in a day or two. Litaker came to the plant to see McBride three or four times, but each time McBride would tell Litaker that he was still thinking the matter over

Called as witness on behalf of the General Counsel, DeLoach, the timekeeper, fully corroborated Litaker's testimony concerning the message which the latter had given him to convey to his foreman, and testified further that he had duly delivered the message to Cagle right after lunch but that Cagle had then said nothing. DeLoach also testified that on occasion other employees had told him that they would not be back after lunch, and he could not say that any of them had been suspended. Indeed, DeLoach also testified that normally the practice was for an employee who wanted to take time off to contact his supervisor, but that if the latter was not available to contact DeLoach. It is apparent, therefore, that Litaker had conducted himself in accordance with the recognized practice. Moreover, both Cook and Cagle testified that DeLoach had given them the message from Litaker that he had had to leave, although Cagle testified that DeLoach told him that Litaker had had to leave to see to some business.

McBride testified that he was looking for Litaker after lunch, because he had let a welder off and needed him, and when he could not find him asked Cook where he was. According to McBride, the latter did not mention the message that DeLoach had given him,

but told McBride that he was having lunch in his car which was parked right next to Litaker's car in the plant parking lot, and that Litaker came out of the plant and drove off in his car without saying anything to Cook. It was this, contended McBride, that led him to pull Litaker's card.

I do not credit McBride's testimony concerning the discharge of Litaker, although it may be that his testimony was not deliberately false. The retired superintendent impressed me as having only the vaguest recollection of the events in which he had been involved. At one point in his testimony, his own counsel felt called upon to exclaim in connection with another lapse of memory on McBride's part: "I think the witness has lost his recollection."[24] In attempting to justify the pulling of Litaker's card on the ground that he had deliberately passed Cook in his car without telling him that he was leaving for the day, I believe that McBride was repeating a story that Cook probably told much later in the effort to rationalize the action taken in the case of Litaker. The story could not possibly be true, moreover, for Litaker would hardly have taken his car to go *across the street* to the Plaza Cafe, as he himself testified, and the respondent does not challenge Litaker's testimony that

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[24] An even more interesting lapse of memory on McBride's part is to be found in the following question and answer:

> Q. Do I understand your answer to be—did anyone suggest to you that it would help the company in this election if you discharged the most active Union men in the plant?
>
> A. I don't recall any suggestion like that. *It might have been made, but I don't recall it.* I did not pay any attention to it anyway [emphasis supplied].

he had lunch in the Plaza Cafe. Furthermore, although McBride testified that he did not learn of the message that DeLoach had given Cook and Cagle concerning Litaker's absence until a week or so after he pulled Litaker's card, both Cook and Cagle testified that they told McBride about the message they had received from DeLoach. A week or so after the event, when McBride learned the truth, was not too late for him to restore Litaker to the payroll, but it is significant that he failed to do so, despite the fact that Litaker kept asking to be put back to work; and, according to McBride himself, was a good employee with whom he had never had any trouble.

It is quite apparent that the respondent did not put too much faith in the story that Litaker saw Cook in his car and passed him by, for another basic weakness of the story is that Cook did not testify that Litaker actually saw him when he passed within 6 to 8 feet of his car. The respondent produced, however, another witness by the name of George M. Hawk, another employee of the Standard Forge plant, who testified that it was he, rather than Sanford, who had had lunch with Litaker on Saturday, November 5. According to Hawk, Litaker came over to his table, and over his beer confided that the reason he did not feel so good was that he had been drinking the night before and had had a quarrel with his girl friend. Also, according to Hawk, Litaker returned to the Plaza Cafe between 3:45 and 4 p.m. and watched the football game while drinking another beer. The respondent also produced another employee, W. O. Robinson, who was also a welder but who did not work in the same department

as Litaker and who testified that on the Thursday preceding the Saturday that Litaker was absent from work due to his illness, he had had lunch with Litaker and two other employees, Doug Sanford and Nelson Gillespie, and that in the course of the conversation at the lunch Litaker had confided that he intended to take Saturday afternoon off to watch a ball game, and had dared McBride to fire him. According to Robinson, moreover, Litaker had made this defiant announcement despite the fact that he warned Litaker that another one of the welders, T. A. Cox, might want to take off that Saturday afternoon. Cox had in fact been excused by McBride about 10 a.m. on Saturday. On the other hand, counsel for the General Counsel called as a witness Litaker's mother, a quiet, soft-spoken lady, who confirmed her son's testimony that he was ill the Saturday afternoon in question, came home about 1 p.m. lay down on the couch, and watched a football game on television and remained at home during the whole weekend. Counsel for the respondent are not so ungallant as to accuse Litaker's mother of deliberately lying under oath. They argue, charitably, that in giving the testimony that she gave, she must have been "mistaken." But Mrs. Litaker's testimony was too positive to be explained away in this manner; and if her testimony was not true, she was indeed lying under oath. I prefer to believe that she was telling the truth, and that Hawk and Robinson, whose demeanor did not suggest to me that they were telling the truth, were "mistaken." But, apart from demeanor, the testimony of Hawk and Robinson is difficult to credit. Hawk hardly knew Litaker and knew him only by his nickname "Sonny," and he was not accustomed

to lunch with the latter. It is not very likely that Litaker would have unburdened himself to Hawk about his most intimate affairs. Hawk also has the demerit of having plainly contradicted himself as to whether he had signed a union authorization card.[25] As for Robinson, he did not seem to be a witness whose memory was very good, for he could not remember whether T. A. Cox actually took off the Saturday afternoon in question, or whether or to whom, if anyne in management, he repeated what Litaker, supposedly, had told him. The picture which he attempted to draw of Litaker was, moreover, unreal, for Litaker, a quiet, soft-spoken individual, did not impress me as given to defiance.

But even if I had implicit faith in the respondent's witnesses, including Hawk and Robinson, it could make no difference, for the plain truth of the matter is that the stories told by Hawk and Robinson about Litaker had nothing whatsoever to do with his termination. McBride did not discharge Litaker because he had lied about his being sick and had actually taken the afternoon off to watch a football game on television. The rumors about Litaker's alleged misconduct did not reach the ears of McBride until long after Litaker had departed from Standard Forge. Thus, McBride testified:

> TRIAL EXAMINER: Did you know what he [Litaker] had been doing Saturday afternoon on the Saturday that he was absent?

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[25] Hawk so testified, but in his prehearing affidavit he deposed: "I did not sign a union card for this union."

THE WITNESS: Did I know when he was leaving?

TRIAL EXAMINER: No, did you know what he was actually doing that Saturday afternoon?

THE WITNESS: Only hearsay. I did hear that he sat over across the road or highway in a cafe and watched a football game. *That had no bearing on it* [emphasis supplied]

TRIAL EXAMINER: And when did you get this hearsay?

THE WITNESS: I did not get that hearsay until *weeks* after Litaker failed to show up. *That had no bearing on it* [emphasis supplied]

McBride discharged Litaker, therefore, simply because he had taken off a Saturday afternoon without directly telling his foreman, although this was common practice. Even if it be assumed that McBride really needed Litaker because another welder — presumably Cox — had taken the afternoon off, Litaker did not know this and McBride did not tell him, although he had advance notice that Cox would take the afternoon off. He would hardly have pulled the card of Litaker if he had not fallen into disfavor because of his leadership in the union drive. It would seem hardly necessary to add that there was nothing *malum in se* in Litaker watching a televised football game, although

he was sick. Many hospitals nowadays have a television set in every sickroom.

(b) *In the case of Cannon*

A rather singular aspect of the case of Cannon is the wide area of disagreement that exists as to the circumstances and causes of his discharge. There are in fact three different accounts available in the record: (1) Cannon's own account; (2) McBride's account; and (3) the account of counsel for the respondent. In the latter two accounts, it is necessary also to distinguish between the remote and the immediate causes that are advanced to justify Cannon's discharge.

Cannon's own account of his discharge was that at 3:15 p.m. on December 15, 1966, McBride walked up to him and, handing him his vacation check, told him: "Cannon, I want you to turn in your piecework and your regular time because I am going to have to let you go." When Cannon asked for an explanation, McBride said: "I have heard that you hit the machine with a hammer and also you haven't been starting to work at 7:00 o'clock."

In his testimony, Cannon conceded that he had been 30 minutes late for work that week but that nobody had asked him to give any explanation of his lateness. Cannon also pointed out that being late for work was very unusual with him, and that he had been late only once or twice in the previous 3 years. As for hitting of the machine, he explained that this was his own drill press, and that he had come to hit the handle of

the machine when the handle fell, and hit him on the head, due to a defect in the machine. Thus Cannon testified:

> Q. Would you explain to us how you came to hit this machine?
>
> A I will.
>
> I was drilling brake shoes and there is a clevis lock that holds this handle. In order to drill the brake shoe and make the holes in it, you have to clip this handle back in order to twist your jig. I had put the handle back and reached down to twist my jig. When I did, the handle hit me across the head, which is solid steel. In return, by hurting me, I took the hammer, the clevis hook which was held by wire and a bolt through it. I hit it to knock it back up and when I knocked it back up, the handle section fell loose, because the bolt running through was broken.
>
> Q. Did you break that bolt?
>
> A. I did not break the bolt, it was already broken.
>
> Q. This clevis that holds the handle up, what was holding that? Does the bolt that was broken go through the clevis hook?
>
> A. It goes through the bar that holds the clevis hook. The handle will stay up, but when the bolt breaks the handle falls before the clevis lock falls down.
>
> Q. And you said something about having wire on this?
>
> A. It was an old machine and you had wire on the handle section that drilled. When the

bolt breaks, the wire gives and it drops that clevis and it fell and hit me.[26]

The machine on which Cannon worked was indeed a very old one. It was at least a quarter of a century old, and the handle of the machine had fallen before but it had never before hit Cannon on the head. It is obvious that Cannon, as he further explained, did not strike back at the handle in order to damage or destroy the machine but in order to keep the handle up, although he also did this in anger because of the pain that he was suffering. Nothing was said to Cannon about his striking the machine at the time that the incident occurred, and immediately after it — namely on the same day — the machine was repaired by the maintenance man. The incident was not mentioned until a few days later when McBride discharged Cannon on December 15.

In attempting to explain the discharge of Cannon, McBride did not so much as mention the lateness of Cannon a few days before his discharge, and Cannon was not even asked the reason for his being late that morning. McBride dwelt rather upon a series of accumulated incidents which stretched over a period of months and went back to the commencement of the union drive. As he put it, "it had built up over several different things," and as he continued in his testimony, he kept on saying "that built it up a little more."

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[26] A number of employees in the vicinity of Cannon's machine, who were called as witnesses by the respondent, also testified about this incident. In the main, their testimony agrees with Cannon's but where there are differences I credit the testimony of Cannon rather than that of the respondent's witnesses.

What McBride dwelt on first, and for the most part, was really the surveillances of Cannon by Cagle and himself in the effort to get him to remain at his work station, as already related. "On top of that," as McBridge put it, it had been reported to him that Cannon had told Cagle "to get out of the department." At this point, McBride concluded, he told Cannon that "while he was on his vacation to look for another job." McBride, thus far, had not even mentioned that Cannon had hit his machine, and had to be prodded by a leading question, whereupon he finally mentioned that it had been reported to him that Cannon "took a hammer and broke his machine."

Counsel for the respondent give still different reasons for Cannon's discharge, and, according to them, these were: (1) "laying down on the job"; (2) "ordering his supervisor out of the shop"; and (3) hitting his drill press with a hammer and breaking it. Counsel assert, moreover, that Cannon himself testified that he had been told that his separation was based on his 'loafing' during work hours and on his destruction of company property." Counsel also assert that Cannon himself admitted that "he had been late for work *without explanation*" [emphasis supplied] and "off the job talking to other employees." All this presents a rather distorted view of the facts and Cannon's own testimony. McBride never used the word "loafing," and while Cannon admitted that he talked to other employees, which, obviously, was not forbidden, he did not admit, as seems to be implied, that he was talking to the other employees *about the union* during working time. It is also not true that he had been late to work

"without explanation," since there is no evidence that anybody asked him for an explanation, either at the time of the event or at the hearing. It is surely hyperbole, moreover, to speak of the drill press incident in terms of "the destruction of company property," or to say that when Cannon asked Cagle "to get off his back," he was "ordering" him out of the shop or out of his department.

Counsel for the respondent go a lot further than any of their witnesses; moreover, in contending that in the incident in which Cannon is accused of ordering Cagle out of the shop he "brandished a file at Cagle." This contention is based, supposedly, on the testimony of Cagle relating to the incident. Cagle's testimony was as follows:

> I walked over there and I said, "William, where have you been"? He just raised up — he was butting a shoe in the jig to drill and he raised up and grabbed the file off of the table that was laying there. He said, "I wish you would get out of here and stay off my back. You stay on my back all the time." I said, "William, I am not staying on your back. I just want you to stay on your job." I said, "I am not on your back what so ever. I just want you to stay on your job."
>
> ---
>
> *Now, whether he was going to hit me with that file or not, I don't know, he grabbed it up in his hands* [emphasis supplied].

It is apparent that Cagle mentioned the file only to make his story more vivid. He asserted only that Cannon pirated the file from the table; he did not assert that Cannon brandished the file at him. Indeed, he confessed that he did not know what Cannon's intention was, and there is nothing to show that Cannon did not have a perfectly legitimate reason for picking up the file or that a file was not used in his work. There is, therefore, no basis for saying that Cannon brandished the file at Cagle. Even if he had done so, however, the incident would have occurred months before Cannon's discharge, and he was not discharged at the time either for brandishing the file or for ordering Cagle out of the shop.

It is hardly necessary to state that if Cannon had really engaged in the destruction of Company property the respondent would have been entirely justified in discharging him. In fact he had not engaged in any such act of industrial lese majesty as hitting a machine. He was really discharged because of his alleged misconduct in not sticking to his work station but this is only another way of saying that he was discharged because of his union activity. Cannon had long been subjected to persecution because of this activity, and while his reactions to the surveillance to which he was subjected were not always in accordance with the standards of polite etiquette, it is readily understandable under the circumstances. Perhaps the most revealing bit of testimony given by Cagle was in answer to the question "how long had Cannon not been performing his job?" Cagle's answer to this question was: "I would say it has been well, at least ever since they

had started in the union." It is a rather neat coincidence that Cannon ceased to be a desirable employee from the very moment that he started the union drive. By discharging him less than 2 weeks before the election, the respondent provided an object lesson to those employees who might be thinking of supporting the union.

(c) In the case of Marston

Across the driveway from the Standard Forge plant was another plant known as Arctic Traveler, which was a division of Argencam Manufacturing Company. The Standard Forge plant had no vending machines but there were such machines at the Arctic Traveler plant. During the morning of December 17, 1966, Marston, needing some cigarettes, went across to the Arctic Traveler plant to get some there, but in doing so, he did not clock out. As he returned to the Standard Forge plant, he encountered McBride, and the following conversation ensued between McBride and Marston:

> McBRIDE: Yank, did you punch out the clock to go over there?
>
> MARSTON: No, sir; I didn't.
>
> McBRIDE: Well, you know, when you leave the premises you are supposed to punch out?
>
> MARSTON: Well, I just went over there to

get a pack of cigarettes. I have done that most anytime I have ever needed them.

McBRIDE: I have been hearing some complaints about you being over there bothering the men.

MARSTON: No, sir, I haven't been over there bothering the men.

McBRIDE: Well, I think you had better go and punch out.

MARSTON: You mean you are firing me?

McBRIDE: Yes.

Despite the fact, however, that McBride told Marston that he was fired, he also told Marston, as he usually did, to come back and see him, and Marston did so twice without being restored to the payroll.

McBride's explanation of Marston's discharge was that he had received complaint, both from people at Arctic Traveler and from Whitmire, that Marston had been going over to Arctic Traveler "very often," and that he started watching him, and did so for several days until he finally caught him coming back from Arctic Traveler. McBride set great store, apparently, on catching Marston *flagrante delicto*, so that it could not be said that he was acting on the basis of hearsay, for he testified in answer to the question: "Does anyone else go to Arctic Traveler?" that he did not catch

them on these occasions or see them. McBride also claimed that in going over to Arctic Traveler Marston had been guilty of the violation of a plant rule, which, in this case was in the form of a written notice on the timeclock and had been posted at least a year before Marston's discharge. But it was merely stated in this notice in general terms that employees leaving the premises were to punch their timecards.

The General Counsel produced witness after witness who testified that it was common practice for employees to go over to Arctic Traveler to make use of its vending machines and even for other purposes, and the evidence not only of witnesses for the General Counsel but also of a witness for the respondent establishes beyond a doubt that employees were not required to clock out when stepping across to Arctic Traveler to make use of the vending machines there. The respondent's witness who corroborated this was none other than Whitmire, Marston's own foreman! Whitmire claimed that Marston had been engaged in a disappearing act for at least a year before his discharge but if this was indeed so, it was Whitmire himself who was responsible for his absences from the plant. It should be recalled that Whitmire was the foreman who testified that the work rules at Standard Forge were honored more in the breach than in the observance, and it is easy to understand his liberal attitude. In his testimony in connection with Marston's discharge, Whitmire admitted that he, himself, would send Marston over to Arctic Travelers to get cigarettes for him, as well as metal and other supplies and that other employees would also go over to Arctic Traveler

to get cigarettes or to get some material without punching out in any of these instances. It seems that Whitmire was building himself a cabin, and in order to obtain the needed material and supplies he was constantly sending Marston to Arctic Traveler to get them for him. It is obvious that the reason assigned for the discharge of Marston represents the flimsiest of all the pretexts seized upon by McBride to get rid of the union leaders. The pretext in the case of Marston was also hypocritical.

IV. The Remedy

In view of the serious nature of the respondent's unfair labor practices, I shall recommend a broad form of cease-and-desist order, restraining the respondent from infringing upon any of the rights guaranteed to employees by Section 7 of the Act.

To remedy the discharges of Clarence Robert Litaker, William E. Cannon and Roy A. Marston, I shall also recommend, by way of affirmative relief, that the respondent offer to them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed by them, discharging, if necessary, any new employees hired subsequent to the date of their discharges in order to replace them. I shall also recommend that the respondent make these three employees whole for any loss of pay they may have suffered by reason of their discharges by payment to each of them of a sum of money equal to the amount which he would normally

have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during the said period. The amount of backpay is to be determined in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and interest is to be computed on the amount so determined in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Conclusions of Law

1. The respondent, Standard Forge and Axle Company, Inc., is an employer engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

2. United Steel Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees coercively concerning their union sympathies and activities, including the signing of union authorization cards, and attendance at union meetings; by subjecting to surveillance one of the union meetings of its employees; by inquiring into how its employees would vote in a scheduled Board-conducted election; by threatening its employees with loss of work opportunities and privileges; and by suggesting to its employees that they could obtain the satisfaction of their grievances by abandoning the union and taking up these grievances with a representative of the respondent, the respondent has interfered with, restrained, and coerced its em-

ployees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby committed unfair labor practices affecting commerce within the meaning of Section 8(a) (1) of the Act.

4 By discharging Clarence Robert Litaker, William E. Cannon, and Roy A. Marston, three of its employees, on November 3, 1966, and February 15 and 17, 1967, respectively, and by subsequently refusing to reinstate these three employees, because of their union sympathies and activities, the respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a) (3) and (1) of the Act.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that the respondent, Standard Forge and Axle Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Interrogating its employees coercively concerning their union sympathies and activities, including the signing of union authorization cards and attendance at union meetings; subjecting to surveillance any union meeting of its employees; inquiring into how its employees intend to vote in any Board-conducted election; threatening its employees with loss of work opportunities and privileges if they continue to support the union; or suggesting to its em-

ployees that they abandon the union and obtain the satisfaction of their grievances from the respondent.

(b) Discouraging membership in United Steel Workers of America, AFL-CIO, or any other labor organization of its employees, by discharging any of its employees, or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of their employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Offer to Clarence Robert Litaker, William E. Cannon, and Roy A. Marston immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner and to the extent set forth in section IV of this Decision entitled "The Remedy."

(b) Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and other data necessary to give effect to the backpay requirement.

(d) Post at its plant in Montgomery, Alabama, copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 15, after having been duly signed by respondent's representative, shall be posted by the respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to assure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 20 days from the date of service of this Decision, what steps respondent has taken to comply herewith.[28]

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[27] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[28] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 15, in writing, within 10 days from the date of this Order, what steps Respondent had taken to comply herewith."

IT IS ALSO RECOMMENDED that the Regional Director's Decision of May 12, 1967, directing a second election be affirmed, and that he be authorized to conduct such election as soon as, in his judgment, the effects of the respondent's unfair labor practices have been dissipated.

Dated at Washington, D.C. October 12, 1967

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate our employees coercively concerning their union sympathies and activities, including the signing of union authorization cards and attendance at union meetings.

WE WILL NOT subject to surveillance any union meeting of our employees.

WE WILL NOT inquire how our employees intend to vote in any Board-conducted election.

WE WILL NOT threaten our employees with loss of work opportunities or privileges if they continue to support the union.

WE WILL NOT suggest to our employees that they abandon the union and obtain the satisfaction of their grievances through us.

WE WILL NOT discourage membership in United Steel Workers of America, AFL-CIO, or any other labor organization of our employees, by discriminating with respect to the hire or tenure of their employment or any term or condition of their employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer to Clarence Robert Litaker, William E. Cannon, and Roy A. Marston, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any

loss of pay they may have suffered by reason of our discrimination against them.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

STANDARD FORGE AND AXLE COMPANY, INC.
(Employer)

Dated ___ By _____
(Representative) (Title)

NOTE: We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola), 701 Loyola Avenue, New Orleans, Louisiana 70113, Telephone 527-6361.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27,161

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

STANDARD FORGE AND AXLE COMPANY, INC.,
Respondent.

Before THORNBERRY, MORGAN and CARSWELL,
Circuit Judges

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board to enforce its Order dated March 27, 1968, directed against Standard Forge and Axle Company, Inc., its officers, agents, successors, and assigns. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on October 22, 1969, handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced, and that Standard Forge and Axle Company, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

ENTERED: Nov. 13, 1969

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27161

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

STANDARD FORGE AND AXLE COMPANY,
Respondent.

Before: Thornberry and Morgan, Circuit Judges*

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board to enforce its order dated March 27, 1968, directed against the above named Respondent, its officers, agents, successors and assigns. The Court, having fully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on October 22, 1969, handed down its opinion enforcing the Board's order. On Peti-

*Judge Carswell participated in the original decision but did not take part in the Court's action on the petition for rehearing.

tion for Rehearing filed by the Respondent, this Court, on May 21, 1970, handed down its opinion enforcing as modified, the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that Standard Forge and Axle Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interrogating it employees coercively concerning their union sympathies and activities, including the signing of union authorization cards and attendance at union meetings; subjecting to surveillance any union meeting of its employees; inquiring into how its employees intend to vote in any board-conducted election; threatening its employees with loss of work opportunities and privileges if they continue to support the union; or suggesting to its employees that they abandon the United Steel Workers of America, AFL-CIO (hereinafter called the Union) and obtain the satisfaction of their grievances from the respondent.

(b) Discouraging membership in the union or any other labor organization of its employees, by discharging any of its employees, or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of their employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act, as amended (hereinafter called the Act).

2. Take the following affirmative action in order to effectuate the policies of the Act, as amended.

(a) Offer to Clarence Robert Litaker, William E. Cannon, and Roy A. Marston immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner and to the extent set forth in Section IV of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and other data necessary to give effect to the backpay requirement.

(d) Post at its plant in Montgomery, Alabama, copies of the attached notice marked "Appendix."

Copies of said notice, on forms provided by the Regional Director for Region 15, (New Orleans, Louisiana) after having been duly signed by respondent's representatives, shall be posted by the respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Judgment, what steps respondent has taken to comply herewith.

ENTERED: AUG 7 1970.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a judgment of the United States Court of Appeals, enforcing as modified, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate our employees coercively concerning their union sympathies and activities, including the signing of union authorization cards and attendance at union meetings.

WE WILL NOT subject to surveillance any union meeting of our employees.

WE WILL NOT inquire how our employees intend to vote in any Board-conducted election.

WE WILL NOT threaten our employees with loss of work opportunities or privileges if they continue to support the union.

WE WILL NOT suggest to our employees that they abandon the union and obtain the satisfaction of their grievances through us.

WE WILL NOT discourage membership in United Steel Workers of America, AFL-CIO, or any other labor organization of our employees, by discriminating with respect to the hire or tenure of their employment or any term or condition of their employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer to Clarence Robert Litaker, William E. Cannon, and Roy A. Marston, im-

mediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of our discrimination against them.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

STANDARD FORGE AND
AXLE COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

NOTE. We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola), 701 Loyola Avenue, New Orleans, Louisiana 70113, Telephone 527-6361.

[redacted]

In the Supreme Court of the United States

October Term, 1970

STANDARD FORGE AND AXLE COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

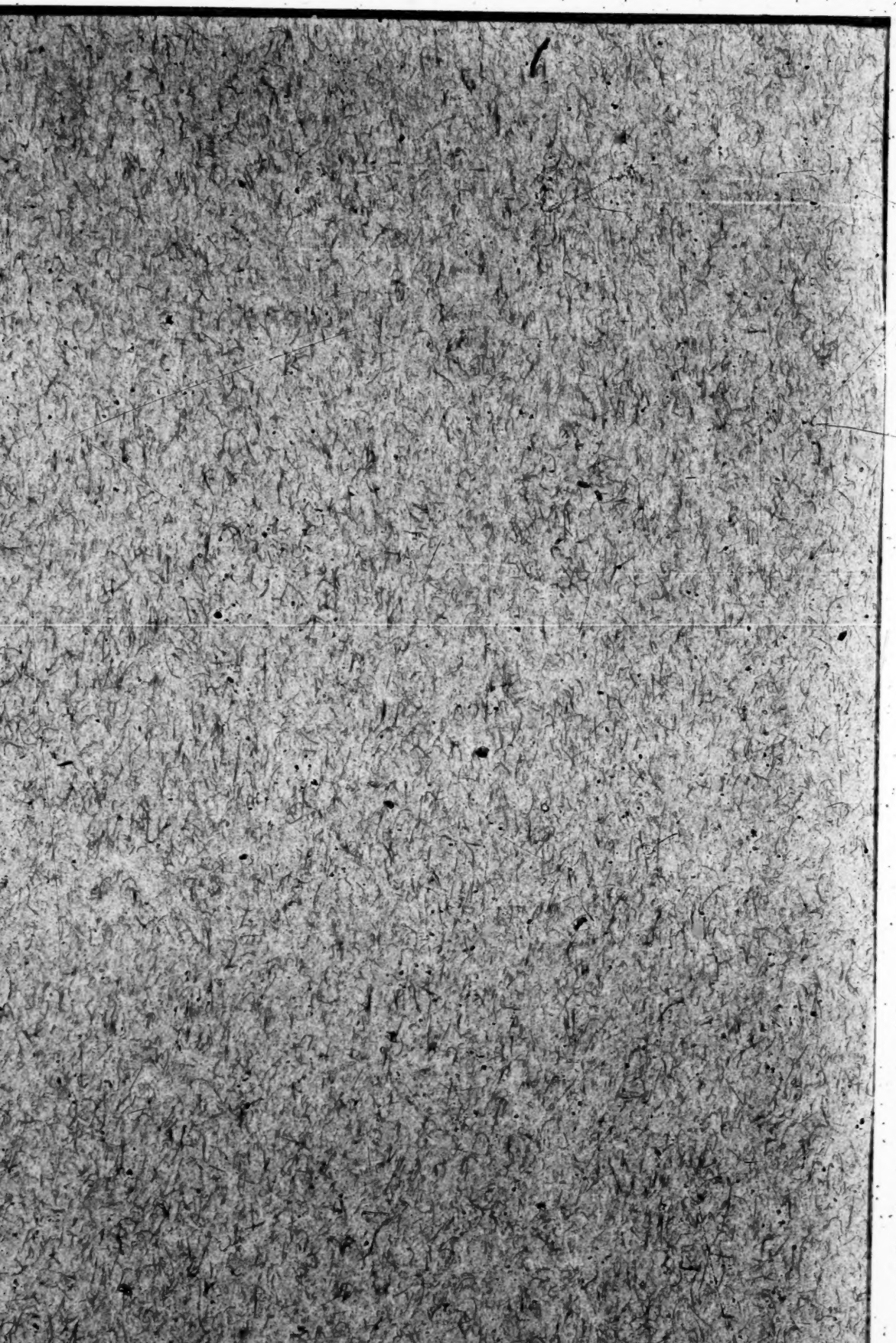
ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

[redacted]
General Counsel,

[redacted]
Associate General Counsel,

[redacted]
Assistant General Counsel,

[redacted]
Attorney,
National Labor Relations Board,



INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement:	
A. The Board's decision	3
1. The unfair labor practices	3
2. The procedural issue	6
3. The Board's order	9
B. The decision of the court of appeals	9
Argument	10
Conclusion	11

CITATIONS

Cases:

National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575	10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	10

Statutes and regulations:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 7	2
Section 8(a)(1)	2, 3, 4, 6, 10
Section 8(a)(3)	4
29 C.F.R. 102.16	7
29 C.F.R. 102.24	7

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 552

STANDARD FORGE AND AXLE COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 1A-8A) is reported at 420 F. 2d 508; the opinion on rehearing (Pet. App. 9A-11A) is reported at 427 F. 2d 344. The Board's decision and order (Pet. App. 12A-78A) are reported at 170 NLRB No. 82.

JURISDICTION

The amended judgment of the court of appeals was entered on August 7, 1970 (Pet. App. 84A). The petition for a writ of certiorari was filed on August 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the National Labor Relations Board that the company violated Section 8(a)(1) of the National Labor Relations Act by keeping a union meeting under surveillance and by threatening its employees that unionization would lead to loss of employment.

2. Whether the Board's procedure was fair and proper.

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 4-5 of the petition. Also relevant are Sections 7 and 8(a)(1) of the Act which provide:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

STATEMENT

A. The Board's Decision

1. *The unfair labor practices*

After one of petitioner's employees, William Cannon, contacted the United Steelworkers of America, AFL-CIO, in September 1966, the Union embarked upon a campaign to organize the Company's plant (A. 10; 147).[1] At the first union meeting, held in mid-October, Cannon was selected chairman of the organizational drive and employees Clarence Litaker and Roy Marston were selected assistant chairmen (A. 10; 148, 154, 162). The Union notified the Company on November 7 that it could make a showing of employee interest at the plant sufficient to obtain a Board representation election; and, on November 23, the Union, by letter, requested recognition (A. 10; 148, 149). On December 5, the Union filed a petition for an election with the Board; a Board election was scheduled for February 23, 1967 (A. 11; 408). The Company's management immediately began an anti-union campaign.

The Board found (Pet. App. 20A-30A, 68A, 71A), and the court of appeals agreed (Pet. App. 2A-3A,

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[1] "A." references are to the Appendix to the parties' briefs filed in the court below.

7A), that the Company coercively interrogated employees concerning their union activities and voting intentions, threatened them with loss of benefits, and offered them inducements, all in violation of Section 8(a)(1) of the Act, and also that it discharged employees Cannon, Litaker, and Marston because of their union activity, in violation of Section 8(a)(3). The petition does not appear to challenge these findings (see Pet. 2-4), but only the further findings that the Company also violated Section 8(a)(1) by keeping a union meeting under surveillance and by circulating a letter which threatened the employees with loss of employment. The facts respecting these matters are as follows:

On Sunday, December 18, 20 to 25 of the Company's employees attended a union meeting at the Union's hall in Prattville, Alabama, a small town near the Company's plant with a business district of one street, two blocks long (A. 21-22; 128, 139-140, 148-149, 157, 214-215). As the employees arrived at the meeting, scheduled for 2:00 p.m., they noticed Foreman Frazier Paul and a known opponent of the Union, employee Clarence Jenkins, sitting in a car parked down the street from the Hall. Paul and Jenkins remained in the car for 30 or 45 minutes while the meeting was in progress (A. 22, 25; 139-140, 148-149, 157, 214-215, 277-280, 284-285). Although Paul and Jenkins allegedly had come to Prattville only to collect a debt owed Jenkins by an employee of a local newspaper whose office was housed in a building alongside the Union's hall (A. 22; 283-284, 276-278), Jenkins admittedly knew that a union

meeting was scheduled that day (A. 23-24; 288). Moreover, when Jenkins first went to the door of the newspaper office, he received no response to his knock but heard noises. Instead of continuing to knock, he returned to the car and waited with Paul for 30 or 45 minutes before making any further effort to see his debtor (A. 23; 278-280).

In its effort to defeat the Union, the Company, on February 9, 1967, distributed to its employees a letter signed by sales manager J. A. Rumbley discussing the effect unionization would have on the Company's sales (A. 25-27, 31; 422-423). A paragraph of Rumbley's letter read:

> Customers buy products on the basis of prices, delivery and dependability. The facts are that in some cases we are the sole source of supply for many of our customers. Our sales to customers who are buying all of their axles from us amounts to more than 70% of our total volume of sales. We have been told by many of these customers that we would not continue to be the sole source of supply if we became unionized, because of the ever present possibility of a work stoppage due to strikes or walkouts [A. 422-423.]

At the Board hearing, the Company conceded that the customers referred to purchased axles from its competitors from time to time (A. 27; 303-305) and that only 3 of these cutomers had said that the Company would cease to be the exclusive supplier of axles; none had threatened to drop the Company altogether (A. 27; 304-305, 308).

On this basis, the Board found that "Paul and Jenkins knew that there was a union meeting in

progress," that they "lingered on the scene in order to keep the union meeting under surveillance," and that the Company thereby violated Section 8(a)(1) of the Act (Pet. App. 34A). The Board also found that Rumbley's letter of February 9, particularly when considered "in the context of many other unfair labor practices, including * * * the discharge of at least one of the leaders of the union movement," contained "the threat * * * that unionization would lead to loss of employment" (Pet. App. 37A-38A).[2]

2. *The procedural issue*

The notice of hearing in this case issued on May 16, 1967; the hearing itself was held on July 18, 19, and 20, 1967, in Montgomery, Alabama (A. 8). During the week prior to the hearing, Company counsel, John Bacheller, visited the Company's plant and interviewed employees in preparation for the hearing (A. 83). These interviews lasted almost three days —July 10, 11, 12—and between 5 and 10 employees were questioned (A. 81, 83). On Friday, July 14, Bacheller received a report that counsel for the General Counsel, J. Thomas McGrath, had told one of

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[2] The Board also found that a circular and a booklet distributed to the employees was violative of the Act since they, like Rumbley's letter, conveyed to the employees "the message that unionization would not only be futile but could only lead to strikes, loss of income, and violence" (Pet. App. 40A). The court of appeals disagreed, finding that the circular and the booklet merely contained a permissible expression of views and opinion (Pet. App. 10A). In view of the factual nature of the disagreement, the Board has sought no further review of this issue.

the interviewed employees that Bacheller's action was improper and could provide the basis for filing an unfair labor practice charge (A. 76). The same day, Bacheller, by telegram, moved the Board's Chief Trial Examiner in Washington, D.C., for a continuance. The motion was denied, for, under the Board Rules and Regulations, 29 C.F.R. Sections 102.24 and 102.16, pre-hearing motions must be addressed to the Regional Director (A. 84-85). No such motion was filed with the Regional Director prior to the hearing. The next day, July 15, Bacheller returned to the Company's plant and reinterviewed the employee who had been advised by McGrath, asking him whether he had been advised to file unfair labor practice charges. The employee "felt his conversation * * * with the Counsel for the General Counsel was a private conversation. And while he would neither affirm or deny the fact that he had been advised to file unfair labor practice charges, he declined to answer" (A. 76).

On Tuesday, July 18, when the Board hearing convened, Company Counsel Bacheller orally moved for a continuance of the proceedings so that the "Trial Examiner or Regional Director can conduct an investigation" of the matter, adding that "should there be a basis found to the truthfulness of the information * * * the remedy would be that employees of Standard Forge and Axle would be advised by the Regional Director and Counsel for the General Counsel affirmatively that we have the right to conduct proper questioning prior to the trial" (A. 90). The Trial Examiner denied the motion for

continuance on the ground that under the Board's Rules motions for an adjournment must be made to the Regional Director, and that the failure to do so here had caused the witnesses, the counsel, and the Trial Examiner to travel a considerable distance. The Examiner expressly provided, however, that Bachelder could renew the motion at the close of the General Counsel's case if he still thought that he had not had an adequate opportunity to prepare the Company's case. Company counsel did not subsequently renew his motion. (Pet. App. 17A-18A, n. 2; A. 86, 88-89).[3]

Company counsel also inquired whether he had the right to question witnesses in regard to what counsel for the General Counsel had told them. The Trial Examiner responded, "I should not commit myself at this point, as to what would be proper Cross Examination on a particular witness" (A. 91). On one occasion during the hearing, Company counsel attempted to cross-examine one of the General Counsel's witnesses respecting his claim of improper conduct by counsel for the General Counsel. Objections to this line of cross-examination were sustained on the grounds that it was outside the scope of the direct testimony and did not raise any doubt as to the truthfulness of the witness' testimony (A. 121-124).

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[3] Upon questioning by the Trial Examiner, counsel for the General Counsel, McGrath, acknowledged that he had talked to employees after Bacheller's interviews, but stated that the Company's allegation as to the contents of his conversations was "false" (A. 83).

The Board held that the Trial Examiner's denial of the Company's motion for a continuance was proper "[i]n view of the fact that the Trial Examiner granted leave to [petitioner] to renew its motion for a continuance at the close of the General Counsel's case if [petitioner] still thought it had not had an adequate opportunity to prepare for the hearing, and the fact that [petitioner] failed to renew such motion" (Pet. App. 13A, n. 1).

3. *The Board's order*

The Board ordered the Company to cease and desist from the unfair labor practices found, or from in any other manner interfering with its employees' rights under the Act. The Board also ordered the Company to offer the three employees discriminated against reinstatement with backpay, and to post appropriate notices. (Pet. App. 73A-75A, 13A-14A, n. 4.)

B. The Decision of the Court of Appeals

The court of appeals sustained the Board's unfair labor practice findings and conclusions except in one respect (n. 2, *supra*), and enforced its order (Pet. App. 1A-8A, 9A-11A).[4] The court found that, in the circumstances of this case, "the denial of a continuance was [not] an abuse of discretion by the Examiner" (Pet. App. 8A).

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[4] The court, however, narrowed the order, substituting "in any like or related manner" for "in any other manner" (Pet. App. 10A-11A).

ARGUMENT

1. The substantive questions raised by petitioner are not presented on this record. Petitioner's contention (Pet. 47-52) that Supervisor Paul and employee Jenkins, a known opponent of the Union, did not keep a union meeting under surveillance in violation of Section 8(a)(1) of the Act is based on its premise that the men innocently came upon the union meeting while on a personal errand and departed after accomplishing it; however, the Board found (Pet. App. 34A), and the court of appeals sustained its finding (Pet. App. 4A), that Paul and Jenkins knew that there was a union meeting in progress and that they lingered there in order to keep the meeting under surveillance. Similarly, petitioner's contention (Pet. 41-47) that sales manager Rumbley's letter merely entailed a factual discussion of the effects of unionization upon the Company's sales is contrary to the Board's finding (Pet. App. 37A-38A), which the court of appeals accepted (Pet. App. 4A-5A), that, in the context of the Company's extreme antagonism to the Union, Rumbley's misleading remarks were coercive and designed to convey the message that unionization would lead to loss of employment. See *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620. Petitioner's challenge to these findings thus presents only evidentiary issues, which do not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

2. Petitioner's allegation of procedural unfairness similarly raises no issue warranting further review. The Trial Examiner has a large measure of discretion in determining whether to grant a continuance, and the question whether that discretion was abused necessarily turns on the facts of the particular case. In any event, for the reasons given by the court below (Pet. App. 7A-8A), the Trial Examiner was clearly reasonable in refusing a continuance here. Moreover, as the court further found (Pet. App. 8A), a "review of the record does not reveal that the action hindered the cross-examination or preparation of Company counsel to any significant extent."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

DANIEL M. KATZ,
Attorney,
National Labor Relations Board.

SEPTEMBER 1970.

CERTIORARI DENIED N.C.R.

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